



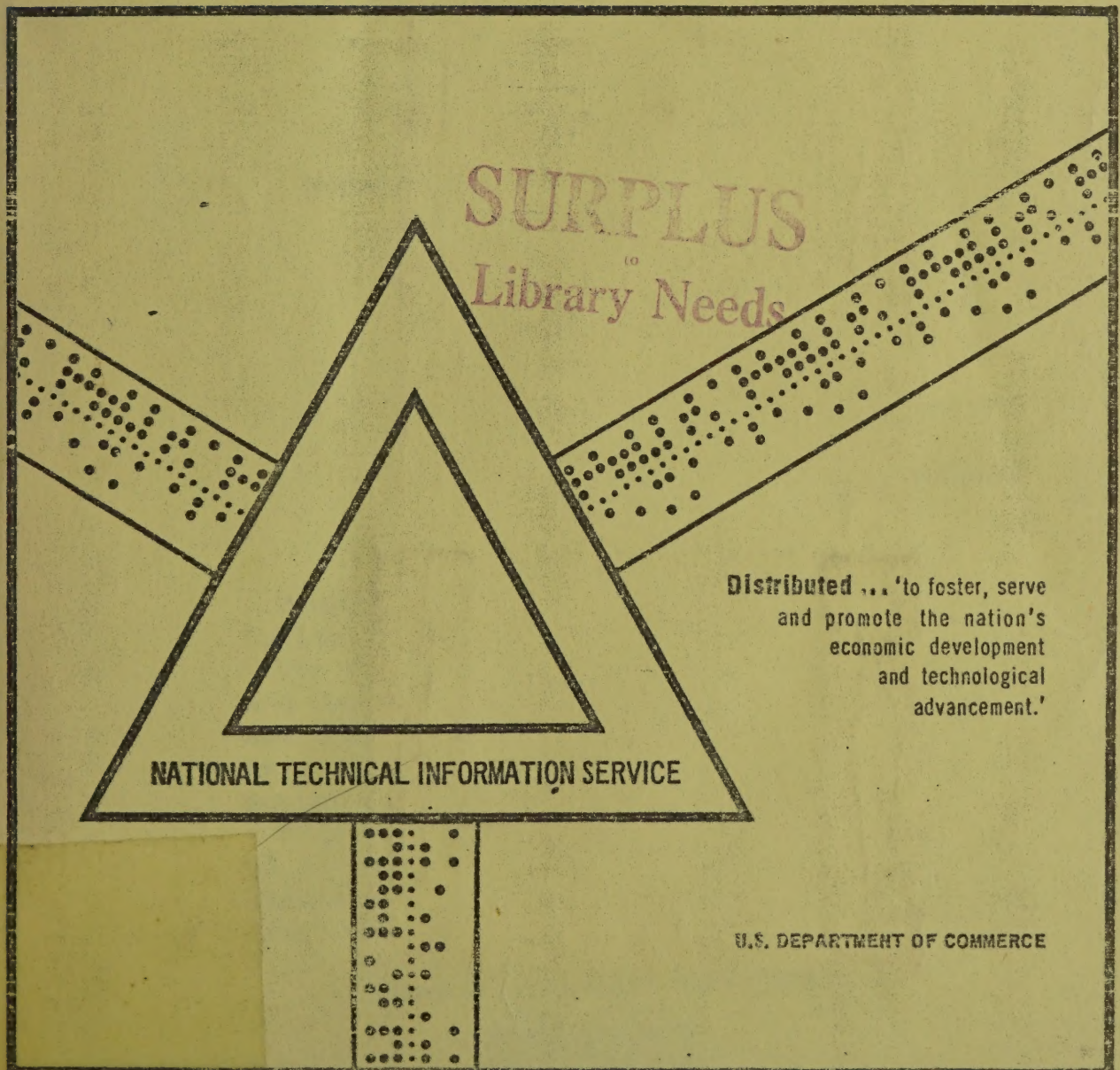
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FEDERAL PUBLIC LAND LAWS AND POLICIES RELATING TO USE AND OCCUPANCY-VOLUME I

Daniel, Mann, Johnson & Mendenhall
Los Angeles, California

November 1970



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FEDERAL PUBLIC LAND LAWS AND POLICIES
RELATING TO USE AND OCCUPANCY

Prepared for the
Public Land Law Review Commission

by

Daniel, Mann, Johnson & Mendenhall
Los Angeles, California

Volume I

Republished with revisions
November 1970

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The opinions, findings, conclusions
and data expressed in this publication
are those of the authors and not nec-
essarily those of the Public Land Law
Review Commission.

This publication constitutes only one
of a number of sources of information
utilized by the Commission in the con-
duct of its public land study program.

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Public Land Law Review Commission

FEDERAL PUBLIC LAND LAWS AND POLICIES RELATING TO USE AND OCCUPANCY
Volume I

by Daniel, Mann, Johnson & Mendenhall

Republished with revisions November 1970

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FOREWORD

This manuscript is one of a series which was prepared for the Public Land Law Review Commission as part of its data base in forming the recommendations for future public land policies that have been forwarded to Congress and the President of the United States in our report titled One Third of the Nation's Land.^{1/}

In establishing the Public Land Law Review Commission in September 1964, Congress declared the following policy: That the public lands of the United States shall be (a) retained and managed or (b) disposed of, all in a manner to provide the maximum benefit for the general public. It also directed that a comprehensive review be made of the public land laws and the related administrative rules and regulations to determine whether and to what extent revisions are necessary to accomplish the stated policy objective.

Considerable evidence pointed to the need for such a review. Dating back in some cases to the birth of the nation, our public land laws have developed over a long period of years through a series of Acts of Congress which are not fully correlated with each other. Administration of the public lands and the related laws has been divided among several agencies of the Federal Government. Quite possibly, these laws and the manner in which they are administered may be inconsistent with one another and inadequate to meet the current and future needs of the American people.

The Commission was instructed to:

1. Study existing statutes and regulations governing the retention, management, and disposition of the public lands;
2. Review the policies and practices of the Federal agencies charged with administrative jurisdiction over such lands insofar as such policies and practices relate to the retention, management, and disposition of those lands;

^{1/}Available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D. C. - Price \$4.50.

3. Compile data necessary to understand and determine the various demands on the public lands which now exist within the foreseeable future; and
4. Recommend such modifications in existing laws, regulations, policies and practices as will, in the judgment of the Commission, best serve to carry out the policy objective.

To fulfill these requirements, the staff was charged with the responsibility of performing or having performed the appropriate research and of then presenting to the Commission all the information and data necessary as a foundation for the Commission's deliberations, conclusions and recommendations. A study program encompassing various subject areas was undertaken and separate manuscripts were prepared covering each of 33 separate topics.

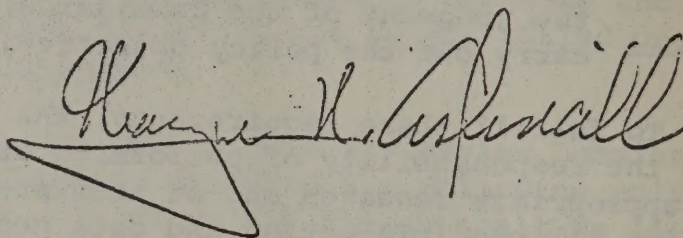
In fulfillment of a policy of maintaining the smallest technical and professional staff possible, most of the studies were accomplished under contract with individuals, institutions such as universities, and research organizations; a few of the studies and analyses were accomplished in-house by the Commission staff, some with consultant assistance.

Thus, while we reviewed the whole body of public land laws at one time, each study was designed to examine only a portion of the public lands complex and should be utilized with this understanding. There is, therefore, an interrelationship among the studies and the resultant manuscripts that will require review and examination of more than one report in order to obtain a complete view of any one aspect of public land law and administration.

Each manuscript was transmitted from the staff with a letter discussing the content of the report and setting forth the policy matters to be considered with respect to the particular subject. A copy of the letter of transmittal for this report has been made a part of this volume in order to assist in the understanding of the approach.

These manuscripts served an extremely useful purpose in providing a common base for discussion in the Commission and between the Commission and its Advisory Council and the representatives of the 50 governors. We believe that they will also be valuable as reference works, not only on Federal

public land matters but concerning all of our natural resources, for use by all levels of government -- Federal, state, and local -- and the academic community as well as those who are interested in the tremendous natural resources that we, as a nation, possess. .

A handwritten signature in dark ink, reading "Wayne N. Aspinall". The signature is fluid and cursive, with a large, sweeping underline that extends to the left.

Wayne N. Aspinall
Chairman

Public Land Law Review Commission

1730 K STREET, N.W.
WASHINGTON, D. C. 20006

November 1, 1970

Honorable Wayne N. Aspinall
Chairman
Public Land Law Review Commission
Washington, D.C.

Dear Mr. Chairman:

Transmitted herewith is a study of Federal Public Land Laws and Policies Relating to Use and Occupancy prepared for the Commission under contract by Daniel, Mann, Johnson & Mendenhall, Los Angeles, California.

The contractor's report was originally submitted to you with our letter of October 2, 1969. After you made copies available to the members of the Commission and the Advisory Council and Governors' Representatives, the manuscript was reviewed and comments were received from them. In addition our staff reviewed the manuscript. The contractor was then furnished with all the comments so that inaccuracies could be corrected.^{1/} However, since this is the contractor's report and not that of our commentators, we have not requested any changes based on interpretations or opinions unless the contractor agreed with those interpretations or opinions.

This study was designed to provide the Commission with a comprehensive understanding of the existing laws, policies, practices, and problems relating to the many occupancy uses of Federal public lands, the effects of the system, and possible alternatives to it. As used in this study "use and occupancy" refers to those uses of land which employ or utilize the spatial characteristics of land, as distinguished from its resources, which are treated in other studies on individual commodities prepared by or under the supervision of the staff.

This study was also designed to identify specific problems and issues associated with the major types of "occupancy" of land such as transportation, utilities, residential, commercial, and industrial uses. For each use, consideration is given to kind of interest, class of land, tenure, qualifications of applicants, acreage limitations, conditions of use,

^{1/}The comments referred to are part of the official files of the Commission. When the Commission ceases to exist, these files will be deposited with the National Archives, Washington, D.C.

charges or pricing, and criteria for selection and allocation. In addition, attention is focused on significant past or projected uses that required, in our opinion, special discussion and analysis: land for new and expanding communities, vacation homes, railroad rights-of-way, and natural areas established for scientific and educational purposes.

The following policy considerations were suggested with respect to various types of spatial or occupancy uses of the public lands:

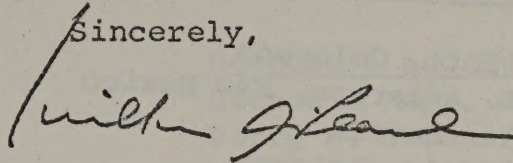
1. Should policies guiding the use of public lands for occupancy purposes be defined and clarified by statute?
2. What general considerations should guide allocation of public land for occupancy purposes?
3. What conditions, if any, should be placed on public lands disposed of or retained and used for occupancy purposes?
4. Should the general qualifications of or special preference to applicants be specified by statute?
5. What provisions should be made for tenure, including possible compensation upon termination of permitted uses?
6. Should the control and administration of occupancy uses be centralized?
7. Should the appropriate Federal agency be authorized to permit nonrailroad uses on railroad right-of-way with the consent of the affected railroad, and should persons holding invalid titles from railroads to right-of-way lands be confirmed in their uses by the Federal Government (and the railroads)?
8. Should the price objective for transfer or lease of lands for occupancy purposes generally be market value?

Other specific problems and issues fall under each major policy consideration. Many of these are identified and reviewed in

the contractor's analysis of both the existing system and possible alternatives to it.

The staff project officer for the study was Melvin L. Yuhas. Joe W. Ingram was the associate project officer.

Sincerely,

A handwritten signature in dark ink, appearing to read "Milton A. Pearl". The signature is fluid and cursive, with a large initial "M" and a long, sweeping underline.

Milton A. Pearl
Director

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Listed above is the professional staff as constituted in August 1969 when the initial manuscripts were being readied for publication by the Clearinghouse for Federal Scientific and Technical Information, together with the sub-professional and stenographic and clerical personnel on the staff at the time of publication of this report.

Harry L. Moffett served as Assistant Director (Administration) from October 1966 to July 1969, and Leland O. Graham, Arthur D. Smith and Max M. Tharp made significant contributions as members of the staff prior to August 1969.

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The following are presently members of the Advisory Council by virtue of their appointment under the provision of the Commission's organic act providing that:

"The Chairman of the Commission shall request the head of each Federal department or independent agency which has an interest in or responsibility with respect to the retention, management, or disposition of the public lands to appoint, and the head of such department or agency shall appoint, a liaison officer who shall work closely with the Commission and its staff in matters pertaining to this Act."

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These 25 members of the Advisory Council are appointed under the provisions of the Commission's organic act, which states that:

"There is hereby established an Advisory Council, which shall consist of the liaison officers appointed under Section 5 of this Act, together with 25 additional members appointed by the Commission who shall be representative of the various major citizen's groups interested in problems relating to the retention, management, and disposition of the public lands,..."

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The Commission's Organic Act states that "The Chairman of the Commission shall invite the Governor of each State to designate a representative to work closely with the Commission and its staff and with the Advisory Council in matters pertaining to this Act". The following are serving as representatives of the Governors of the respective States at this time:

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PUBLIC LAND LAW REVIEW COMMISSION

Background

The public lands of America date back to the time of the Union's formation. Then, and soon thereafter, seven of the original States ceded to the Central Government some 233.4 million acres of land lying westward to the Mississippi River. Thereafter, through purchase and treaty, the United States acquired an additional billion acres of public domain, the last acquisition being the purchase of Alaska from Russia in 1867. Altogether, nearly 2 billion acres of land in 32 States have been part of the public domain at one time or another.

At first, these lands were sold for their revenue. Eventually, however, as the pioneers swept westward, the revenue-raising policy was replaced by one stressing settlement and development of the land. The Homestead Act of 1862 was the first of a series of settlement and development laws enacted over a period of some 60 years - the desert land law, mining laws, and the various homestead laws - all designed to meet a particular need of the period. Meanwhile, many millions of acres were transferred to private ownership through military, railroad, and other land grants, including various grants to the States.

Through these means, nearly 1.2 billion acres have passed from Federal ownership, leaving approximately 715 million acres of the original public domain lands in Federal ownership. Of these 715 million acres 364 million are in the State of Alaska. Add to this the 52 million acres acquired for various purposes, and federally owned lands today amount to approximately 770 million acres - about one-third of the Nation's total land area. Some of these lands are in national forests and some are reserved for national parks, wildlife refuges, and other specific uses; but more than half constitute the "vacant and unappropriated" public domain lands which have never left Federal ownership and have not been dedicated to a specific use pursuant to legislative authorization.

The Act establishing the Public Land Law Review Commission contains in section 10 the following definition:

As used in this Act, the term 'public lands' includes (a) the public domain of the United States, (b) reservations, other than Indian reservations, created from the public domain, (c) lands permanently or temporarily withdrawn, reserved or withheld from private appropriation and disposal under the public land laws, including the mining laws, (d) outstanding interests of the United States in lands patented, conveyed in fee or otherwise, under the public land laws, (e) national forests, (f) wildlife refuges and ranges, and (g) the surface and subsurface resources of all such lands, including the disposition or restriction on disposition of the mineral resources in lands defined by appropriate statute, treaty, or judicial determination as being under the control of the United States in the Outer Continental Shelf.

Working with the Commission are a 33-member Advisory Council and the representatives of the 50 State Governors.

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CHAPTER I
INTRODUCTION

CHAPTER I

INTRODUCTION

I. PREFACE

The Public Land Law Commission was established by the Act of September 19, 1964, 78 Stat. 982, U.S.C. §§ 1391-1400 (1964) as amended by the Act of December 18, 1967, 43 U.S.C.A. § 1394 et seq., to study all public land laws and regulations as well as procedures of Federal agencies administering the laws. Specifically, the Act gives the Commission the statutory responsibility to (1) "study existing statutes and regulations governing the retention, management, and disposition of the public lands"; (2) "review the policies and practices of the Federal agencies charged with administrative jurisdiction over such lands insofar as such policies and practices relate to the retention, management, and disposition of these lands"; and (3) "compile data necessary to understand and determine the various demands on the public lands which now exist and which are likely to exist in the foreseeable future."

This is one of a series of studies designed to provide a basis for carrying out the statutory directive that the Commission recommend to the President and the Congress "such modifications in existing laws, regulations, policies, and practices as will, in the judgment of the Commission, best serve to carry out the policy" that "the public lands of the United States will be (a) retained and managed or (b) disposed of, all in a manner to provide the maximum benefit for the general public."

II. SUBJECT OF THE STUDY

This study is concerned with the Federal and non-Federal use and occupancy of public lands. In particular, it considers the laws and policies that provide for: (1) the disposition of public lands for use and occupancy purposes; and (2) the use and occupancy of retained public lands by permits, lease, license, or other formal documents.

"Use and occupancy" as used in this study refers to the spatial utilization of land as distinguished from utilization of its resources. With the exception of lands used for and occupied by private vacation homes, this study is not concerned with the use and occupancy of public

land for public outdoor recreational purposes. The uses and occupancies considered in this study are for the following:

- Transportation facilities (includes roads, railroads, and airports)
- Utility type transmission facilities, e. g., power lines, gas and oil pipelines, canals and conduits
- Communications facilities
- Water transmission facilities
- Residential uses
- Light industrial and commercial uses
- Heavy industrial uses
- Community facility related (includes refuse dumps, sewage disposal sites, reservoirs for water supply, etc.)
- Reservoir flowage areas
- Education, Science and Research facilities
- Military installations
- Other non-Federal government (state and local) occupancy uses
- Other Federal Government occupancy uses.

III. DESCRIPTION OF THE STUDY

The overall objective of this study is to present information to enable the Commission to determine whether the existing system providing for the use and occupancy of public lands produces the maximum benefit for the general public. Specifically, the objective is to: (1) describe the system; (2) examine its application and administration by the executive agencies concerned; (3) analyze the results and effects of their application and administration; and (4) derive possible alternatives.

To accomplish this objective, the scope of this study includes:

1. Review and description of the laws, regulations, policies and practices concerning use and occupancy of public lands and their administration;
2. Review of certain laws and policies which, although not directly related to use and occupancy of public lands, significantly influence public land policy regarding use and occupancy of public lands;
3. Compilation of data on, and description of, the extent of the use and occupancy of public lands;

4. Analysis of the effects of the application of the existing system on the user, the general public, public land resources and values, and the economic efficiency of the Federal use and occupancy program;
5. Identification and analysis of possible alternatives to or modifications of the existing system; and
6. Evaluation of possible effects on users, on the public and on the resources of such alternatives.

IV. METHODOLOGY

The methods used in conducting this study included: library investigations and other review of secondary source materials, personal interviews, personal correspondence, questionnaires and case studies.

Library research was undertaken to determine applicable provisions of statutes relating to disposal and retention of public lands for use and occupancy purpose. Coincident with this research was review of policies, and regulations as reflected in various Federal agency manuals, directives, declarations of policy, court decisions, legal opinions, and agency decisions. Standard Federal permit forms, licenses, leases which prescribe the conditions of use and occupancy by non-Federal users were also examined.

To enable comparison with data supplied by the Commission relative to charges for public land disposals, and pricing, tenure and tenure conditions on retained lands, personal interviews were conducted with knowledgeable state and Federal agency officials and representatives of private landholders in selected states. In addition, computer processing was utilized to compile and sort much of these data.

Through personal interviews and correspondence with experts, problems associated with present policies of disposal and retention of lands for special occupancy uses were investigated. These special uses included:

1. New and expanding communities
2. Vacation homes
3. Railroad rights-of-way
4. Natural Areas
5. Military and Other Federal Government uses.

Questionnaires were used to assist in obtaining data regarding vacation homes as well as land use patterns under all land ownerships.

The findings of the above research were then analyzed and synthesized to set forth the major problems associated with the present system of law, regulations and practices.

Case studies which were representative of the major problems and issues resulting from apparent deficiencies in existing laws, regulations and/or policies were then selected.

From these analyses alternatives and modifications to the existing system of laws, regulations and policies were derived.

V. ORGANIZATION OF THE STUDY

This study is presented in four volumes. Volume I (Chapters I through IX) contains the Introduction and Summary and discusses the Existing Legal System for the disposal and the use and occupancy of retained lands. Volume II (Chapters X through XIV) presents the Resource Base and Its Uses in terms of recent and present patterns of lands under all ownerships in the United States and Section 10 public lands. A discussion of Special Uses of the Resource Base, including Expanding and New Communities, Vacation Homes, Railroad Rights-of-Way, Military Uses and Natural Areas also appears in this volume. Volume III (Chapters XV through XVIII) presents an Analysis of the Present System and presents Alternatives to the Existing System. Volume IV, Appendices, includes various statistical data upon which the analyses in other Volumes were based, the vacation home questionnaire, case studies, additional alternatives, and a description of state legal systems.

CHAPTER II

SUMMARY

1. INTRODUCTION

A. Introduction and Statement of Purpose

The purpose of this study is to determine the effect of the new curriculum on the learning of the subject of mathematics. The study was conducted in a high school in the city of New York. The subjects of the study were the students of the high school. The study was conducted over a period of six months. The results of the study are presented in the following chapters.

CHAPTER II

SUMMARY

The purpose of this chapter is to summarize the findings of the study. The findings are presented in the following sections.

The findings of the study are presented in the following sections. The first section is a summary of the findings of the study. The second section is a summary of the findings of the study. The third section is a summary of the findings of the study. The fourth section is a summary of the findings of the study. The fifth section is a summary of the findings of the study. The sixth section is a summary of the findings of the study. The seventh section is a summary of the findings of the study. The eighth section is a summary of the findings of the study. The ninth section is a summary of the findings of the study. The tenth section is a summary of the findings of the study.

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CHAPTER II

SUMMARY

I. EXISTING LEGAL SYSTEM

A. Introduction and Orientation to Existing Legal System

This study originated with a research design prepared by the staff of Public Land Law Review Commission embodied in a work statement necessarily broad and general in outline. It has been necessary to redefine its scope to conform to available information. This section is intended to acquaint the reader with the scope of the legal investigation undertaken, the deviation from original task specifications that were necessary, and the manner selected to organize the discussion of the existing legal system.

1. Scope of the Legal Study

It has been essential to supplement this study by adopting where they were available definitions of language used but not otherwise defined from common or trade or industry usage, from relevant federal regulations or legislative materials, from intra-agency materials, and from suggestions of Public Land Law Review Commission staff.

Numerous resources of the public lands which are the subjects of separate studies commissioned by the Public Land Law Review Commission also require various spatial uses of public lands, some of which are within the categories of spatial uses assigned to this study. In order to avoid duplication with resource studies, statutes relating to structures incident to specific resource management were generally excluded from consideration.

It was also necessary to consider in the context of statutes providing for disposal, use, and occupancy of lands for spatial purposes the meaning of the distinctions in classes of public lands described in Section 10 of the Public Land Law Review Commission Act of 1964.

For purposes of organization and description of the existing federal legal system the meaning of certain terms were defined at the outset. "Preference rights" were construed to refer to special treatment afforded members within the class declared eligible by statute for disposal or use of public lands. "Conditions" attached to such privileges were limited to special promises or renunciations exacted of the applicant over and above

the general requirements of the statute. "Criteria" used by federal agencies to determine whether to confer such privileges were considered to be considerations supplemental to the applicable statutory criteria. "Related laws" were those unrelated to public lands administered by agencies without jurisdiction over public lands which nevertheless affect public lands.

2. Performance of the Study of the Existing Federal Legal System

This study has directed consideration of certain basic federal statutes concerning disposal of public lands for specified categories of spatial uses and the identification and description of acts providing for various arrangements for use and occupancy of such lands for such purposes while title and various degrees of control of them remained in federal ownership.

Identification and description of such acts was complicated by their scattered distribution throughout the United States Code and the fact that this large, old, incremental, and poorly indexed body of legislation has not been codified. Judicial decisions concerning the public lands are sparse and rarely representative. The scope of administrative discretion conferred under these statutes is large, but federal regulations promulgated to implement these acts are scattered, poorly indexed, and generally uninformative. Agency decisions concerning these statutes are not always published; those which are published are often virtually inaccessible because they lack a consistent or adequate digest or index systems. Intra-agency materials are generally uninformative because they reiterate statutory or regulatory provisions without supplying the link between these and the instructions contained in the agency directive. Any meaningful description of the policies and interpretations which guide the implementation of these statutes daily at an operational level or any arrangements concerning them which are made between various Federal agencies whose programs they affect is impossible without an empirical investigation.

3. Organization of the Study of the Existing Federal Legal System

It would be conceivable to have organized the presentation of the description of the existing federal legal system concerning disposal, use, or occupancy of public lands for spatial purposes in a number of ways depending upon which aspect of it was of primary interest. As a "system", if such it can be termed, it is undoubtedly most intelligible if viewed historically in the context of the social and political events which generated it. If its operation were of greatest interest, a presentation organized in terms of administrative agencies empowered to implement

these acts would be most desirable. If the legal rights and obligations incident to use or ownership of public lands as real property were of most significance, the discussion of these statutes would best be structured to emphasize the continuum of surrender of control over public lands for spatial purposes reflected in the spectrum of provisions ranging from sale to license of them. The Public Land Law Review Commission has determined that this study of the existing federal legal system be organized in terms of its provisions for particular spatial uses.

Eight categories of uses have been extracted from those listed in the study work contract. These are 1) residential uses of public lands; 2) commercial and industrial uses of public lands; 3) community-facility related uses of public lands; 4) state and local government uses of public lands; 5) education, science, and research uses of public lands; 6) utility uses of public lands; 7) transportation uses of public lands; and 8) military uses of public lands.

The existing federal legal system concerning disposal, use or occupancy of public lands for these purposes is described in chapters four through nine of this report.

Organization of the description of the existing federal legal system concerning disposal or use or occupancy of public lands in terms of its provisions for specified spatial uses is chiefly convenient for remedial purposes. It unavoidably exposes the priorities and values which guide the present allocation of public lands for disposal, use, or occupancy, and puts in issue how well such allocation meets the current and future needs of this society.

The selection of a use-oriented examination of this system does present difficulties in narration. The basic problem encountered in discussing the existing federal legal system in terms of spatial uses is that the statutes were never conceived in this way. They were enacted, or amended, or supplemented as Congress perceived the need and the means to do so. Each act varies greatly in the number of different spatial uses to which it is applicable and the relatedness of such uses to each other. It is most efficient to describe in one place the provisions of a single act and the judicial and administrative construction that they have acquired rather than to repeat this description for each spatial use category to which they apply. It is also desirable for the reader to understand that at least a few land disposal or management policies and the consistent use of certain means of authorization for disposal or use or occupancy of public lands by a given agency or throughout the system do exist regardless of the particular act or the particular spatial use involved. It is the function of this introductory section to describe such broadly applicable statutes and to state what general patterns may be

perceived in the existing Federal legal system. Acts of narrow applicability are treated in the following chapters devoted to the particular spatial use involved.

Chapter III is divided into two sections. The first section states those generalizations possible concerning the federal legal system for disposal, use, or occupancy of public lands. They are few because constitutional authority to dispose of or manage public lands is lodged with Congress and administrative agencies must rely upon express statutory authorization for their actions concerning public lands. Because the statutes are old and incremental they show little uniformity. They vary in whether they authorize sale only, sale or lease, lease only, easements only, or only permission to use public lands for any given purpose. Similarly, they vary in the specificity of their provisions and the amount of discretion left to the administrative agency authorized to implement them. Many expressly limit the maximum amount of land or the maximum duration of time allowed for use which is authorized. A few attach express conditions to the right or privilege conferred. Statutes governing disposal of lands generally state the means of determining the price of sale. Those governing use or occupancy are generally silent concerning compensation if any to be assessed.

Within the limits of statutory authorization conferred, administrative discretion is exercised generally to limit the amount of land made available for any given use to the least amount actually required for a particular use to limit the amount of time for which such lands are made available, to obtain compensation for public lands comparable to the market value of other lands unless a public purpose is served by accepting a lesser amount or waiving compensation, and to protect the public interest in such lands by conditioning their disposal or use in the various regards.

The second section of Chapter III sets forth those statutes which are broadly applicable to the spatial uses which are treated in this study.

B. Summary of Disposal Statutes

1. Lands Available Under Townsite Laws

a. The Townsite Laws of 1863, 1867 and 1874 prescribe three methods whereby lands may be caused to be withdrawn from other forms of entry and made available only according to the schemes outlined:

The President, and since 1943 the Secretary of Interior, is authorized where the "public interest requires it" to reserve sites to be surveyed, appraised, and sold.

Alternately, persons desiring to establish a townsite on unreserved public lands, or persons having already done so, may have the land surveyed and file the plat and field notes, with the county recorder and the Bureau of Land Management.

Finally, when unreserved public lands have already been settled and occupied as a townsite, corporate authorities, or the judge of the county court may enter the land as trustee for the benefit of the actual occupants of that land which is occupied, and the benefit of the community as a whole.

No express limitation on the size of a townsite established by presidential reservation exists. When a townsite is established by occupant plattings, the maximum size plat acceptable for such purposes is 640 acres. The maximum initial entry permitted to be made by trustee is proportionate to the number of inhabitants of the town with a maximum area of 2,580 acres unless the excess acreage is actually settled.

Lots on land established as a townsite by presidential reservation are to be appraised and sold at public auction, for not less than their fair market value.

The public sale of lots in townsites established by occupant platting is conducted in the same manner, but no lot may be sold for less than the minimum price of \$10.00.

When townsite entry is made by trustee, the execution of the trust and the disposal of the lots and the proceeds of sale is conducted under regulation to be prescribed by the law of the state on territory in which the site is located.

The Act of April 6, 1906, 43 U.S.C. § 561, authorizes the Secretary of Interior to withdraw from public entry any lands needed for townsite purposes in connection with irrigation projects established under the Reclamation Act of 1902.

When in the opinion of the Commissioner of Reclamation the public interest requires it, the reserved lands will be surveyed into town lots, with appropriate reservations for public purposes. With the concurrence of the Bureau of Land Management, the Commissioner may then, from time to time, authorize the lots to be appraised and sold at public sale.

The maximum permissible reservation for townsite purposes in each case is 160 acres unless the withdrawal and disposal of townsites in excess of 160 acres is determined to be in the public interest.

Of these up to 20 acres per township in each reclamation project may be reserved for public purposes - for use as county parks, public playgrounds, and community centers. And up to six acres within any townsite, may be conveyed to the officials of a school district which lies within the bounds of the reclamation project for use as school buildings and grounds.

The sale of town lots is made to the highest bidder at public auction for not less than the appraised value. Payment of the purchase price, in not more than five annual installments, may be authorized in the sale order.

Conveyances of public reservations to municipal corporations and conveyances to school districts provide for the reversion to federal ownership if the lands cease to be used for the purposes authorized.

The Act of July 31, 1958 authorizes the Secretary of Agriculture to reserve for townsite purposes National forest lands and submarginal lands administered as part of National forest lands upon a satisfactory showing of the need for such by any existing, petitioning county, city, or other local government subdivision.

Any person, private corporation, firm, or agency is eligible to purchase town lots.

No more than 640 acres may be designated as a townsite for such purposes in response to any one application by a local government subdivision. No more than three lots may be bought by any one purchaser.

Lots are sold to the highest bidder at public auction for not less than their appraised value. A preference right to purchase at the appraised value is accorded to the occupant of lands on which improvements have been constructed by him or his predecessors.

2. Small Tract Act

The Small Tract Act of 1938, 43 U.S.C. § 682(a), authorizes the Secretary of the Interior to sell or lease surveyed, unreserved public land (unsurveyed land may be leased only) or certain withdrawn public

land which the Secretary may classify as chiefly valuable for residential, recreation, business, or community site purposes. Lands may be classified for sale, sale and lease, or lease only.

Small tracts may be disposed of to individuals, partnerships, or associations meeting the usual citizenship requirements; to corporations, both profit and nonprofit, authorized to do business where the land is located; and to a state, territory, municipality, or other governmental subdivision. However, only nonprofit corporations and associations and governmental bodies may apply for land community site purposes.

Generally, no person or organization may purchase or lease more than one tract, not exceeding five acres. However, when more than one tract is needed, each tract may be the subject of a separate application if accompanied by a satisfactory showing that the allowance of more than one application is warranted by the circumstances.

The term of the lease and the amount of rental are specified in the classification order. The term may not exceed 20 years, but may be renewed on a showing that the lessee has constructed substantial improvements. Rental for all sites, except community development sites, is based on the fair market value of the lands, with a minimum rental of \$100/year for business sites and \$25/year for other sites. Rental for community sites will take into consideration the purpose for which the land is used.

Leases for lands classified for lease and sale contain an option to purchase. The term of the lease for lands so classified is specified in the classification order, but may not exceed three years. However, such leases may be renewed on a showing that the lessee's failure to meet the requirements for sale is justified under the circumstances. The net purchase price is the appraised fair market value of the unimproved land as of the date of the lease, less an amount equal to the advance rental for each full lease year subsequent to the filing of an allowable application to purchase.

Lands classified for direct sale are sold to the highest bidder at public auction for not less than their appraised fair market value. Lands suitable for community site development may be sold for less than their fair market value if it is determined that the public use justifies such action.

All mineral rights are reserved to the United States. Lessees may not cut timber from leased lands without prior permission.

The classification order may provide for rights-of-way over each tract for street and road purposes and for public utilities. If the order does not so provide, the right-of-way will be 50 feet along the boundaries of the tract.

Any lease may be cancelled for failure to comply with its terms, conditions, and covenants. Where lands are classified for community site purposes and sold for less than their fair market value, the conveyance will contain a provision for reversion of title to the U.S. if the lands are used for any purpose not consistent with the classification order unless consent to change the use is first obtained.

3. Public Land Sale Act of 1964

The Secretary of Interior is authorized and directed by the Sale of Public Land Act of 1964 to dispose of public lands which have been classified for disposal in accordance with a determination that they are required for the orderly growth and development of a community or are chiefly valuable for residential, commercial, agricultural, industrial, or other public uses or development.

Department of the Interior regulations provide that all classifications must give consideration to ecology, priorities of use, and the relative values of the various resources in particular areas. Lands chiefly valuable for public purposes, urban/suburban purposes, or residential, commercial, agricultural, or industrial purposes will be made available under the Act if adequate zoning regulations are in effect and, where also needed for urban/suburban development, if adequate local government comprehensive plans have been adopted. In all cases, zoning regulations must be sufficient to enable local authorities to prescribe and enforce the proper use and the terms and conditions of the use of the lands.

Lands are available under this Act to: individual citizens over 21 years, partnerships or associations, valid corporations authorized to hold title to real property in the state in which the land is located; any state, county, municipality, or other local government subdivision within which land is located; and any municipality within convenient access to the lands if they are within the same state as the municipality. Disposals under this Act are in tracts which may not exceed 5,120 acres each.

Tracts are available to qualified Governmental agencies at the appraised fair market value and to qualified individuals through competitive bidding at not less than the appraised fair market value.

Mineral rights are reserved to the United States. Conveyances may contain such reasonable restrictions as are in the public interest, but no restrictions to insure proper development of the lands after they have passed from Federal ownership may be imposed.

4. Recreation and Public Purposes Act

The Recreation and Public Purposes Act of 1926 authorizes the Secretary of the Interior to sell or lease surveyed public lands for any recreational or any public purpose. Public purposes include such uses as for parks, historical and monument sites, fish and wildlife refuges, public education and public health facilities, and agricultural experiment stations.

Lands will not be classified for disposal under this Act if land is available under any other public law except the Small Tract Act of 1938 or the Sale of Public Land Act of 1964. If jurisdiction over the land is shared with some other agency or instrumentality, that body must consent to the proposed disposition.

Lands are available under this Act to: any State, Territory, county, municipality or other state, territorial or federal instrumentality or political subdivision in which the lands are situated; to any municipal corporation within convenient access to the land and within the same State or Territory as the land; and to any non-profit corporation or association for purposes consistent with its articles of incorporation or other creating authority. Each applicant must demonstrate that the land is to be used for an established or definitely proposed project.

A state, in its own name or the name of any agency having jurisdiction over the state park system may acquire annually for recreational purposes not more than 6,400 acres involving not more than three sites, plus whatever acreage in sites of not over 10 acres is required to provide small roadside parks and rest areas.

Any state or political subdivision of a state and any nonprofit organization may acquire in its own name not more than 640 acres annually for recreational purposes and, additionally, not more than 640 acres annually for public purposes other than recreation.

The terms of leases under the act may not exceed 25 years, with renewal. Rental and sale charges are based on the fair market value of the property, including merchantable timber, but excluding mineral rights, less 10% if the use is limited to a particular group and 50% if the use is by the general public. In no case may rent be less than 25¢/acre or \$10/lease.

In no case may the sale price be less than \$2.50/acre or \$50/transaction.

Special pricing arrangements are available for specified programs, including fundamental education programs, public health projects, and modern rehabilitation facilities for state penal institutions.

Leases are to contain such terms and conditions necessary for the proper development of the land, the protection of federal property, and the protection of the public interest. Leases are terminable upon failure of the lessee to comply with the terms of the lease. Leases are not transferrable except with the consent of the authorized official.

All patents issued under the Act provide that title shall revert to the U.S. if an attempt is made to transfer title or control over the lands to another; if the lands are devoted to a use other than that for which they were conveyed without consent of competent authority; or if discrimination on the basis of race, creed, color, or national origin is practiced in the use or entrance of patented lands.

All leases and patents reserve mineral rights to the U.S.

Leases and patents authorizing the use of lands for the erection or maintenance of advertising displays on public lands adjacent to highways are issued only in conformity with national and/or state standards or policies.

5. Federal Property and Administrative Services Act of 1949

The Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 471 et seq., prescribes a system whereby the Federal government attempts to achieve economical and efficient utilization and disposal of its property under the direction of a single authority, General Services Administration. Originally, any federal property of

any kind could be disposed of under the Act except the public domain and lands reserved or dedicated for national forest or national park purposes. In 1952, Congress also excluded lands withdrawn or reserved from the public domain unless, in the opinion of both the Secretary of the Interior and the Administrator of General Services Administration, the lands are unsuitable for return to the public domain for disposition under the general public land laws because they are substantially changed in character by improvements or otherwise.

The Act provides for the transfer of excess property -- property which an agency head determines is no longer required for its needs -- to other federal agencies to fulfill the latter's requirements.

When General Services Administration has screened the property reported to be excess, it may determine that the property is not required for other agencies needs and may classify it as surplus property.

Surplus property is disposed of according to its highest and best use. The Administrator of General Services Administration is authorized to assign surplus real property to the Secretary of Health, Education and Welfare for disposal which the Secretary recommends is needed for education or public health purposes.

Authority is also delegated to the Secretaries of Defense, Agriculture, and Interior to dispose, in a manner deemed most advantageous to the U.S., any excess real property under the control of the respective departments which is determined by the department not to be required for the needs and responsibility of all federal agencies and which has a total estimated fair market value of less than \$1,000.

The act provides that the General Services Administration Administrator shall prescribe the extent of reimbursement for transfers of excess property, with the approval of the Director of the Bureau of the Budget only where the transfer involves land and improvements appraised at a fair market value of \$100,000 or more. In most cases, reimbursement is equal to half of the appraised fair market value of the property transferred, or, where the transfer is for the purpose of replacing property of the transferee with more desirable property, half the difference between the value of the property to be replaced and the fair market value of the property replacing it. However, transfer may be made without reimbursement in certain circumstances.

The sole stated restriction on disposal of surplus property to any private interest is that notice be given to the Attorney General of the proposed disposal of real and related personal property which costs \$1,000,000 or more for his advice regarding the applicability of anti-trust laws.

Public agencies which are eligible to receive surplus property pursuant to the statutes collected in the Department of Interior regulations, 41 C.F.R. § 101-47.4905, receive preferential treatment in terms of notice of the availability of such property and opportunity to purchase.

When surplus property is available for one of these specified uses, General Service Administration must give notice to the eligible public agencies that such property is available prior to any public advertising, reference, or other disposal action. The agency then has 20 days to inform General Services of its desire to develop and submit a comprehensive and coordinated plan for the use and procurement of the property.

Except where surplus property is to be disposed of for airport or historical monument purposes or where the estimated fair market value of the property does not exceed \$2,500, it must be appraised for its fair market or fair rental value.

When disposal is to be made to eligible public agencies and the estimated fair market value of the property and other terms are obtained by negotiation, disposal by negotiation is authorized. Disposal by negotiation is also authorized when: the estimated fair market value of the property is less than \$1,000; bid prices after advertising are not reasonable; the character or conditions of the property or unusual circumstances make it impractical to advertise publically for competitive bids and the fair market value of the property and other satisfactory terms of disposal can be obtained by negotiation, and when negotiation is otherwise authorized by the Act or other law. In all other cases, disposals must be made after public advertising for bids. Award will be made to the responsible bidder whose bid will be most advantageous to the government, price and other factors considered. However, all bids may be rejected when it is in the public interest to do so. Credit terms may be offered when the purchase price of surplus property is in excess of \$2,500. However, when a sale is made on credit, the purchaser must agree not to lease or resell the property prior to payment in full without first obtaining prior government approval.

6. Isolated and Mountainous Tracts

The Secretary of the Interior is authorized to initiate the sale of any isolated or disconnected tract or parcel of the public domain and to entertain applications for the sale of non-isolated public lands, the greater part of which is too mountainous or too rough for cultivation. 43 U.S.C. § 1171. Complete discretion is lodged with the Secretary as to whether and when to offer lands for sale under the Act. However, current Department of Interior regulations state that the policy of the Secretary in administering the Act is to take into consideration the criteria set forth in the regulations to the Classification and Multiple Use Act of 1964 and to make available on an orderly basis lands subject to the Act which are more valuable or proper for nonfederal than federal ownership.

Lands are available to individuals, partnerships, associations and corporations.

The maximum size isolated tract that may be offered for sale is 1,520 acres, and the maximum size mountainous tract that may be offered for sale is 760 acres. The Bureau of Land Management may, under circumscribed conditions, subdivide isolated tracts into separate parcels and offer them for sale simultaneously.

Lands are to be sold at public auction after due notice of sale. The highest bidder is declared, and the owner of contiguous lands is accorded a preference right, for a period of not less than 30 days after the highest bid has been declared, to buy the offered lands at the highest bid price, not to exceed three times the appraised price. If there are no qualified preference applicants at the close of the thirty day period, a final certificate is issued to the highest bidder. Until then, it may be determined at any time that the lands should not be sold or that all bids shall be rejected. Patents may contain reservations where necessary, but the effect on the value of the tract caused by the reservation must be considered in determining the appraised price.

7. Reclamation Lands

The Secretary of the Interior is authorized to sell lands acquired under the Reclamation Acts and made available under the Acts of 1911, 43 U.S.C. § 374, and 1920, 43 U.S.C. § 375, (dealing with lands no longer required for reclamation purposes) and the Acts of 1930, 43 U.S.C. § 424, (dealing with lands that are designated unproductive and which are too

small to support a family and pay water charges) and 1950, 43 U.S.C. § 375(b), (dealing with lands withdrawn in connection with irrigation projects for which water is available but which are too small to support a family and too small to qualify as a farm unit open to homestead under the Reclamation Act).

Prior to any disposal under the Acts of 1920, 30, and 50, the Commissioner of Reclamation must determine that sale would be in the best interests of the irrigation project in which the lands are located and that sufficient water supply exists for lands to be sold if they are to be irrigated.

All purchasers must give proof of citizenship. Lands sold under the Acts of 1930 and 1950 (dealing with lands of insufficient size to support a family) are available only to resident farmowners or resident entrymen actually living on the project upon which the land is located.

Under the Acts of 1911 and 1920, the maximum acreage which may be purchased by any one person is 160 acres. Under the Act of 1930, an eligible purchaser may acquire 160 acres, but no more land than would bring his holdings within the project to 320 acres. And under the Act of 1950, an eligible purchaser may acquire 160 acres, but no more land than would bring his total ownership of irrigable land within the project to 160 acres.

Under the four Acts, land may be purchased for not less than its appraised value by competitive bidding at public auction.

If the land is valued at less than \$300, it may be sold at public auction or private sale under the 1920, 30, and 50 Acts.

Under the Acts of 1911 and 1920, conveyance is subject to whatever reservations, conditions, or limitations the Secretary of Interior deems proper; additionally, under the Act of 1920, title to irrigable lands is made subject to compliance with all reclamation laws which are applicable to lands of that character.

Particular provision is made, under the Acts of 1930 and 1950, for reservation of a lien for water charges, and for the reservation of mineral rights to the same extent as patents issued under the homestead laws.

C. Use and Occupancy Statutes Overview

1. Lands Administered by the Bureau of Land Management

General procedures and policies apply whenever a right-of-way is granted by the Bureau of Land Management under the authority of those statutes which authorize the Secretary of Interior to permit the use and occupancy of public lands for specified purposes. Rights-of-way are defined to include licenses, permits or easements, as used in the authorizing statute.

Eligible applicants include corporations, individuals and associations. Application is made by letter in which the applicant must cite the act to be invoked and state the primary purpose for which the right-of-way is to be used. In general, the letter must be accompanied by a map showing the survey of the right-of-way.

No interest granted as a right-of-way gives the holder any estate of any kind in fee in the lands. No interest greater than a revocable permit is to be granted, unless the applicable statute provides otherwise. The right-of-way is to be granted for the longest period possible consistent with the statutory and regulatory authority for the permit, the expected changes in land use and value, and the period of need for the permit.

In order to facilitate the use of the right-of-way applied for, the applicant may be granted an additional right-of-way for ingress and egress to the primary right-of-way. The applicant may also submit a request for permission to construct right-of-way improvements in advance of a right-of-way.

No charge is made for the right-of-way where the use and occupancy are exclusively for certain specified projects or where the use is by a Federal agency. Additionally, no charge is made for permits granted under the authority of certain statutes. Otherwise, a charge is made equal to the fair market value of the right-of-way, but not less than \$25 per 5-year period for any right-of-way.

An applicant, by accepting a right-of-way, agrees to comply with the terms and conditions specified in the regulations. A period of 5 years from the date of the approval of the right-of-way is usually allowed for construction. Proof of construction must be submitted to the Bureau of Land Management upon completion of construction. Any proposed transfer of the right-of-way granted must be approved by the Bureau of

Land Management. Right-of-way may be cancelled for violation of the provisions of the regulations, for violation of the terms and conditions of the right-of-way, and for abandonment, nonuse, or failure to construct within the period allowed unless otherwise provided by law.

Special land use permits are also issued by the Bureau of Land Management, under the Secretary of Interior's general authority to administer the public lands. Department of Interior regulations provide that it is the policy of the Secretary of Interior, in the administration of lands under the jurisdictions of the Bureau of Land Management, to permit the use thereof, where practical, for special purposes not specifically provided for by existing law.

Eligible applicants include any citizen, any group or association of citizens, any corporation authorized to conduct business in the State in which the land involved is situated, any agency of the Federal government, and any state or political subdivision thereof. Upon expiration of a permit, the existing permittee will, upon filing an application for renewal, be considered a preferred applicant.

In all cases, the special land use permit is made revocable at the discretion of the authorized officer at any time, upon notice, if in his judgment the lands should be devoted to another use or the conditions of the permit have been breached. Permits are not to contain any terms which would in any way limit their revocability on the motion of the Government. In his application, the applicant specifies the land desired and the period for which he desires the land, not to exceed 5 years. A permit will not be issued for a larger area than is determined to be necessary for the contemplated use. The Bureau of Land Management Classification Officer determines the proper term for the permit, not to exceed the term requested.

Where lands are desired by an individual, partnership or corporation organized for profit, rental is to be fixed at fair market value of the privilege granted. Minimum rental is fixed at not less than \$10 per payment period. No rental is charged Federal agencies. State agencies, political subdivisions thereof and nonprofit corporations are charged rental fixed at the fair market value of the privilege less specified deductions.

All permits contain standard conditions. Additional provision is made for any stipulations which are considered necessary to protect the land and resources involved and the public interest in general. A permit may not be assigned without approval.

2. Lands Administered by the Forest Service

Several acts of Congress authorize the Secretary of Interior to grant rights-of-way over National Forest land without the consent of the Secretary of Agriculture. However, Department of Interior regulations require that applicants for rights-of-way in National Forests enter such stipulations as the Forest Service may require. Standard stipulations have been developed by the Forest Service for railroad rights-of-way and for easements for telephone and telegraph lines, power transmission lines and radio-electronic sites which are issued under the Secretary of Agriculture's own authority. These may be used as a basis for the development of stipulations for easements other than the railroad rights-of-way granted under the Secretary of Interior's authority. Additions are to be made to standard stipulations when needed to take care of unusual situations. The Forest Service administers all conditions of the stipulations required for the protection of National Forests.

The Secretary of Agriculture himself has the authority to grant easements for specified purposes. Apart from general policy statements, the Forest Service provisions regarding the grant of easements are tied to the specific uses for which authority to grant the easements is given and are treated in the appropriate use section.

Authority to allow the use and occupancy of National Forest lands is granted to the Secretary of Agriculture by a number of statutes. Department of Agriculture regulations provide that all uses of National Forest lands, improvements and resources are to be designated special uses and to be authorized by special use permits. Special use permits may be either annual permits or term permits. Annual permits are revocable instruments and may be issued without limitation as to type of use or acreage so long as the use is compatible with the management and protection objectives of the National Forest on which the use is authorized. Annual permits are generally authorized for a use of short duration and are limited to the time actually needed for exercising the use privilege. They are amendable at the discretion of the Forest Service. Term permits are used when development or construction requires large capital outlays which cannot be amortized or salvaged within a reasonably short period and when the returns of a business depend on long periods of stable and continuous use. They are normally issued for a period not to exceed 20 years.

Any individual, corporation, association, municipality or agency of a state or local government is eligible to apply for a special use permit. Applications for permits may be made orally, by letter, by bid in response to a prospectus, or by specially prescribed form. Each application must contain sufficient information to fully describe the use requested. Additional special instructions may exist relating to

the application for specific uses. When a concession special use opportunity is available, there is a demonstrated public need for the service, and a competitive interest exists, a prospectus will be issued and proposals invited in order to obtain the best qualified permittee and an equitable return to the government.

Special use permits may be issued free of charge under the guidelines established in the Department of Agriculture regulations. These generally apply when the use is by a governmental agency, of a public or semi-public nature, for noncommercial purposes, and of benefit to the Government in the administration of the National Forests. Free special uses are covered by annual permits only. When a charge is made, the minimum annual fee is \$5.00. Most fees are implemented in a permit as flat fees. The exception to the use of flat fees is the graduated fee which is used in concession type operations only. A nominal flat fee may be charged semi-public and public agencies which cannot qualify for free use because of restrictions placed on the use of public land. However, in the case of term permits, the preferred practice is to charge a fee commensurate with the value of the use.

As a matter of policy, standard conditions apply to the issuance of all special use permits. Printed clauses on the various permit forms cover all standard requirements; and other, additional standard or optional clauses for individual uses may be added. It is the general policy of the Forest Service not to allow the transference of special use permits. Special use permits are terminated on expiration of the term of the permit, through agreement with the permittee, as provided by the terms of the permit, on abandonment of the use by the permittee, and after failure to pay when notice that fees are overdue has been given. Term permits may be revoked only when there has been a breach of the condition of the permit and the permittee has been given an opportunity to show cause why the permit should not be revoked and has failed to do so or when the land is required for a higher public use. An annual permit may be revoked for a violation of the terms or at the discretion of the Forest Service. Ownership of improvements in terminated special use cases is determined by the terms of the permit.

3. Lands Administered by the Bureau of Reclamation

The Bureau of Reclamation issues easements, leases, licenses and permits. Easements are defined as instruments which grant an estate in land and are not revocable except as provided in the instrument. Licenses are defined as instruments granting an authority to do an act or acts on land under the control of the Bureau without

gaining an interest therein. Permits are defined as instruments giving a personal privilege which is usually temporary and revocable.

Under each of these instruments, lands are made available to citizens, domestic corporations, and governmental or quasi-governmental entities.

Except in the case of a perpetual easement, any instrument is limited to a period of 50 years or less. In the case of easements, the consent of the water users organization involved is to be obtained for any easement or right-of-way proposed for a term of 25 years or longer.

In the case of easements and licenses, the interest is granted to governmental or quasi-governmental entities or to others giving reciprocal privileges without charge, otherwise a charge is made. Permits for the removal of materials may be given without charge if the use is by a public agency in the construction of public roads or streets within the project or its immediate vicinity; otherwise, an advertisement calling for competitive bids is issued or the local prevailing rate is charged.

Leases are generally executed after advertisement for bids, and award is made to the highest responsible bidder.

In all cases, the instrument is executed on terms and conditions that are deemed adequate to protect the interests of the United States and the project for which the particular lands are administered and to be compatible with the purposes for which the lands were withdrawn.

D. Residential, Commercial and Industrial Uses

The Mining Claims Occupancy Act is the only statutory authority which may be considered to deal exclusively with disposal for residential uses. The Act authorizes the Secretary of Interior to convey maximum tenure, consistent with the public interest, to an occupant of an unpatented mining claim which the Secretary has determined to be invalid or to an occupant of an unpatented mining claim who, after notice that the claim is believed to be invalid, relinquishes to the U.S. all rights to the claim which he may have under the mining laws. If such lands have been withdrawn in aid of a function of another federal agency, the conveyance may be made only upon consent of that agency. When such consent is not given, the Secretary may grant the applicant a right to purchase for residential purposes an interest in another tract available under the Act. The applicant must be an occupant owner of valuable improvements in an unpatented mining claim which constitutes for him a principal place

of residence. The maximum amount of land available under the Act is an area within the applicant's claim of 5 acres or the number of acres actually occupied by him, whichever is less. The purchase price may not be more than the appraised fair market value and not less than \$5.00 per acre; in determining the price, the Secretary may take into consideration the equities claimed by the applicant.

Two statutes authorize use and occupancy for residential use exclusively. Continued occupancy of tracts which were occupied by indigents when they were acquired under the Weeks Law is permitted under authority of the Granger Thye Act as a matter of social policy; permits issued under the Act remain in effect so long as the occupant remains qualified. The use and occupancy of military lands for residential purposes is also expressly authorized by specific statute.

Beside these statutes which provide for disposal and use and occupancy of Section 10 lands for residential purposes exclusively, statutes of broad applicability permit the disposal and use and occupancy of Section 10 lands for residential as well as other purposes. The statutes authorizing the disposal of land for residential and other purposes described in Chapter One should be referred to: there are no provisions of special applicability to residential use. The statutes which authorize use and occupancy for residential as well as other purposes form the basis of the discussion which follows.

There are no provisions of major and unique application to use and occupancy for permanent, year-round homes.

The use and occupancy of national forest lands for seasonal homes is regulated primarily by the recreation residence permit. Recreation residences are defined as residences occupying planned, approved tracts established for recreation residence use. Since a recreation residence constitutes a private privilege use of forest lands, the use is not allowed to interfere with public or semi-public uses that have a higher priority. Once a permit is granted, the holder has exclusive use, but again the use is highly circumscribed. The location of improvements, for example, is subject to approval of the forest officer. While more than one family may have an interest in a recreation residence, the permit is issued only to one person for administrative purposes. A single family may hold only one recreation resident permit. Term permits, ordinarily issued for 20 years, are preferred over annual permits. To the extent possible, all permit holders in a tract are given the same kind of permits and termination dates. Residence lots, including recreation residences, are rented for their fair commercial value for residence purposes, with a minimum of \$25. Annual fees are the same for annual and long-term permits. Permits for recreation residences may be

terminated when the lands are needed for public or semi-public uses. When ownership of recreation residences is transferred, nonconformities under the permit are to be corrected. Sales require approval of the forest supervisor.

While isolated cabins on forest lands do not constitute recreation residences, they are placed under special permit as an administration expediency. The policy of the Forest Service is to issue such permits only as a settlement device, and the period of occupancy normally is not to exceed ten years.

The Forest Service also authorizes and grants leases for temporary dwelling houses near mineral or other springs within national forests.

Finally, the Bureau of Land Management grants 5-year permits for private cabin sites in recreation and conservation areas where general public recreational requirements are limited. If the public interest is deemed to prevail, improvements cannot be placed on a cabin site without prior approval. A reasonable time for amortization is allowed, but only for the period of the existing period plus extensions that are not inconsistent with public use. Transfer is allowed only on approval, and nonuse for two years terminates the permit.

There are no statutes which provide exclusively for the disposal of Section 10 lands for commercial purposes. Four statutes, 16 U.S.C. § 20 (Supp. IV, 1969), 16 U.S.C. § 495 (1964), 43 U.S.C. § 971 (1964) and 43 U.S.C. § 2201 (1964) provide exclusively for the use and occupancy of Section 10 lands for commercial use. The first three statutes were enacted to serve the needs of transient persons on federal lands; the fourth deals with services to permanent residents on federal lands who are organized into a community.

16 U.S.C. § 20 authorizes the Secretary of Interior to grant concessions for tourist accommodations, facilities and services in areas administered by the National Park Service. The policy of the statute is to provide adequate services and facilities in natural areas at reasonable prices under carefully controlled safeguards that insure that heavy visitation will not impair park values. The number and size of sites are limited to the minimum essential to proper and satisfactory operation and to the extent consistent with the "carrying capacity" of the area. Plans and specifications of buildings, the items sold, and the reasonableness of the concessioners' prices are subject to regulation. Continuity in operation is encouraged, and one responsible concessioner may be given exclusive authority over all accommodations and services in an area and a preferential right to provide new accommodations to meet increased needs. A significant feature of the statute is that the concessioner acquires a possessory interest in structures and improvements. This interest may be assigned and transferred, and provision is made for compensation on termination.

43 U.S.C. § 971 authorizes the Secretary of Interior to lease lands adjacent to mineral, medicinal or other springs for the erection of bathhouses, hotels and other improvements for the accommodation of the public. The period of time for which the lease is granted and the acreage desired is set by the lessee in his application. The term is not to exceed 20 years. Since granting of the lease is discretionary, the term and acreage specified need not be approved in their entirety. Use of the land only for the purposes specified in the application is authorized, and no other use will be permitted. Leases give the Bureau of Land Management officer power to fix rates and prices if he deems it necessary. No provision is made for rental.

16 U.S.C. § 495 authorizes the Secretary of Agriculture to permit sanitariums and hotels within national forests in areas near mineral, medical, and other springs. Terms, duration and compensation to be paid for the privilege are within the discretion of the Secretary.

43 U.S.C. § 2201 authorizes the AEC to permit commercial use within lands controlled by it. The AEC may grant a privilege, lease or permit to responsible persons who demonstrate the ability to meet the needs of the community, who have experience in the area, who contribute to the welfare of the community and who can provide the services required. Fair and reasonable charges are made by the AEC.

Laws of broad applicability that have particular application to commercial use focus on use and occupancy rather than disposal. The laws that authorize disposal for commercial as well as other purposes described in Chapter One should be referred to.

Under the laws of general applicability that authorize use and occupancy, the use of Section 10 lands for commercial purposes is highly circumscribed. Permits for commercial profit-making enterprises are issued by the Forest Service only where there is a general public need and the activity will be compatible with multiple use and recreation management planning. Where private lands are available, use of public land is generally prohibited. Although authorized by statute, as a matter of policy, the commercial use of national park lands is not permitted except as specifically authorized by law or as may be incidental to the accommodation and entertainment of visitors.

With few exceptions, applicants for commercial and industrial uses need have no special qualifications. However, the Forest Service requires that an applicant for commercial purposes show ability to

perform, liquid assets of 25% of the estimated development cost and general business experience. An attempt is made to obtain the best qualified permittee.

The length of the permits granted varies from agency to agency. For example, a Bureau of Land Management permit may be granted for only 5 years, and the Bureau of Reclamation may issue a permit for boating and docking privileges for a maximum of 50 years.

Bureau of Land Management permits are restricted to 5 acres. Forest Service term permits generally to 80 acres.

Under the statutes of broad applicability, there are not special obligations imposed on commercial or industrial users as a class. However, conditions relating to particular uses are common. For example, concession permittees must indemnify the Government in the event of damage or claims resulting from the permitted use.

Special use permits issued by the Forest Service are not available for commercial use without charge. Graduated fees are used only in concession permits where identifiable sales are generated and can serve as a fee base. In cases where sales are not identifiable and where commercial uses are not under concession permits, a flat fee is used commensurate with the value of the use.

E. State and Local Government and Community Facility Related Uses

While other discussions in this part focus on uses for particular purposes, this discussion focuses on the owner or user. Those statutes which make lands available to governmental agencies exclusively are covered in detail.

43 U.S.C. §§ 931c, 931d authorizes the head of any department or agency of the U.S. government having jurisdiction over public land and national forests to grant leases, permits, and easements for the construction and maintenance of public buildings and other public works. Such leases, permits and easements may be granted to states, counties, cities, towns, townships, municipal corporations and other public agencies. The following provisions apply to interests granted by the Bureau of Land Management. A lease, permit or easement may be granted for up to 30 years in order to allow the grantee sufficient tenure to justify expenditure of funds for improvements of a permanent

nature. However, the lease period will be kept at a reasonable minimum. All leases, easements and permits are renewable at the discretion of the authorized officer. Rental for the lease, permit or easement is to be based upon the fair market value of the property. Leases and permits are to contain the usual terms and conditions required by law, public policy and as the Classification Officer determines to be necessary to protect the public interest and public property. The terms and conditions of easements are to be governed by the Department of Interior regulations applicable to rights-of-way insofar as possible.

The Federal Property and Administrative Services Act of 1949 continues in effect Section 13(h) of the Surplus Property Act of 1944. Pursuant to this section, any disposal agency may, with the approval of the Administrator of General Services Administration, convey to any state, political subdivision, instrumentalities thereof or municipality surplus property which, in the determination of the Secretary of interior, is suitable and desirable for use as a public park, public recreation area, or historic monument for the benefit of the public. When property is determined surplus and available for public park or recreation uses, prior to taking any other disposal action, the disposal agency must give notice of its availability to the public agencies eligible to procure the property under this section and must allow an interested agency a reasonable time in which to develop a plan for the use and procurement of the property. Conveyances for public park and recreation purposes are to be made at a price equal to 50% of the fair market value of the property conveyed. Conveyances of property for historic monument purposes are to be made free of charge. Conveyances under this authority shall provide that all property shall be used and maintained for the purpose for which it was conveyed for a period of not less than 20 years and may contain such other terms, reservations, restrictions and conditions as are determined necessary to safeguard the interests of the U.S.

Special provisions which apply to state and local governments under the townsite provisions of the reclamation acts are discussed in Chapter One and are not repeated here.

Pursuant to 16 U.S.C. § 565b, fire control improvements and lands outside national forests used with the improvements may be conveyed to a state or one of its subdivisions that have assumed fire control responsibilities. Title is to revert if the land is not used for fire prevention and fire suppression purposes. In addition, rights of way,

mineral rights and entry permits and rights to collect and retain rents are reserved. Other reservations and conditions may be imposed. Unless the fair market value is less than \$100 or the national forests continue to benefit substantially, the transfer is made at fair market value which can be discounted up to 20 percent because of the restrictions on title.

40 U.S.C. § 345b provides for the disposal by the Administrator of General Services Administration of buildings which have been supplanted by new structures and their sites for which there is not further federal need. Disposal is only to state and political subdivisions. The Administrator's discretionary authority to sell these lands include an express authorization to prescribe terms, rules and regulations covering the disposal. The total purchase price must not be less than 50 per cent of the appraised value of the land.

The remaining discussion centers on the statutes of broad applicability. The characteristics which they share in their treatment of state and local government bodies as opposed to private entities are pointed out, and specific statutes are referred to only by way of illustration.

The Cemetery Sales Act of 1907 provides exclusively for a particular kind of community facility and, because of this separate statutory base, is treated individually. The rest of the discussion focuses on the special provisions applicable to the issuance of permits for community facility related uses by the Forest Service and the special provisions governing the sale and lease of community sites under the Small Tract Act administered by the Bureau of Land Management.

Except where the statutes contemplate an exclusively proprietary use being made of the land and prefer resident occupiers or adjoining resident landowners, for the most part whenever land is made available to private persons and organizations, it is made available to governmental agencies as well. The statutory pattern is rather to favor than to discriminate against state and local government applicants. Further, the general pattern is to grant governmental agencies preferences with respect to tenure, acreage and price. Where land is made available to state and local governments at a reduced cost, the statute normally contemplates that the interest granted shall terminate if the land ceases to be used for the purpose for which it was granted.

F. Education, Science and Research Uses

Public lands may be valuable as the sites of educational and research functions, as in the use of public lands for schools. 16 U.S.C. § 551 (1964) authorizes revocable permits for school purposes. 16 U.S.C. § 497 (1964) provides for permits not exceeding 30 years at the same 3 percent but limited to 80 acres. Long term permits for parcels over 80 acres are available at a 5 percent rental through 43 U.S.C. § 931c (1964). Permits pursuant to this section however are seldom granted. In all cases, the Forest Service requires that the site requested must present no "serious conflicts with management plans." These lands, administered by the Forest Service for the Department of Agriculture, are generally available to private, nonprofit enterprises as well as municipalities and other local governmental agencies.

Other statutes provide for school uses in more circumscribed situations. Pursuant to 43 U.S.C. § 570, the Secretary of the Interior through the Bureau of Reclamation is specifically authorized to provide a maximum of 6 acres of public land for school sites within reclamation townsites. 40 U.S.C. § 484(k)(1)A and (k)(2) authorizes the General Services Administrator to assign surplus property to the Secretary of Health, Education and Welfare for disposal related to "school, classroom or other educational use". Under 20 U.S.C. § 640 (1964) construction of schools on military basis is provided for where free public education would not otherwise be available. As the issue of conservation became relevant previously, such school sites must not conflict with important military or federal purposes.

Pursuant to 10 U.S.C. § 2667 (1964) the military may lease land for public school use whether or not related to military dependents. Such use is considered to "promote the national defense or otherwise be in the public interest." Education-use preference is exemplified in the Air Force directives that permit the state or its political subdivisions to satisfy normal rental requirements by maintenance and protection of the leased property. Similarly, education uses may be granted 25 year permits, rather than the standard 5 year lease.

Besides schools, public lands may be the location for other uses, educational, scientific, and research such as observatories, rain gauges, weather stations, research stations and cloud-seeding devices. If such uses qualify as a governmental function or a function of a "public nature", permits will be issued free under 36 C.F.R. § 251.2 (1969)..

Statutory authorization for use of public lands of particular historical, archeological or paleontological interest are considerably more detailed than the sites uses just outlined. The Antiquities Act of 1906, the Historic Sites Act of 1935 and the National Historic Preservation Act of 1966 share two educational goals; to identify and promote public and scholarly familiarity with the existence of objects of historical importance on public lands and to open public lands to, and encourage bona fide research and study of and public exposure to such objects.

Pursuant to the Antiquities Act, the basic research access authority, "reputable" museums, colleges and other institutions may qualify for permits to excavate, gather and examine ruins.

The Historic Sites Act and the National Preservation System are public exposure oriented statutes. The former authorizes the Secretary of the Interior to enter into contracts and cooperative agreements with public and private agencies to operate historic or archeological sites with the purpose of making them available to the public. The later is essentially a protective and classification device. Although additional research activities may flow from this provision, effects on historic research uses of the public lands are otherwise incidental.

Further broad authority in the basic National Park Service provisions authorize the Secretary of the Interior to grant historical sites to state and local governmental entities. The Bureau of Land Management Manual S 6231 and the Forest Service Manual S 2726 outline the basic application and qualification procedures pursuant to these three general authorizations.

Under the Recreation and Public Purpose Act, Bureau of Land Management transfers to other federal agencies or to state or local governments or appropriate nonprofit organizations on Bureau of Land Management managed lands may be transferred. The Bureau of Sport Fisheries and Wildlife, the Atomic Energy Commission and the Defense Department permit surveys and other research lands controlled by them under their various permit provisions and departmental practices.

Research into, and study of the natural resources extant on federal lands are basic to education, science and research uses. This underlying theme is often implicit in the public land law. However, since such purposes are often the reason for specific acquisitions or retentions, inclusion of lands that "contain ecological, geological or other features of scientific, educational, scenic or historical value" are specifically required. The typical pattern of such specific legislation for research

usually includes a Congressional statement of concern, an authorization of a cabinet secretary or his delegate to take steps to facilitate general remedial policies and the authorization, in turn, to enter into cooperative agreements in order to facilitate the research aspect, usually of prime importance, of the project. "Cooperative agreements" presumably encompass the substantial variety of land use grants necessary for basic land access essential to study and research. The opening of National Forest land to experiments and demonstrations, special permits to schools for "experimental and study purposes", and the establishment of experimental areas, "research natural areas" and the Forest Product Laboratory have been announced by the Forest Service.

G. Utility Uses

1. Water Storage and Transmission

The existing federal legal system governing the use of public lands for purposes of water storage and transmission may be divided into two basic clusters of statutes. One of these clusters concerns recognition, direct grant, or administrative grant of rights-of-way used by non-federal entities over public lands incident to the exercise of water rights vested in them under state law: 43 U.S.C. § 661, 946, 948, 664, 951, 956, 959 and 16 U.S.C. § 524.

The second cluster of statutes consists of two acts which reserve to the United States rights-of-way over public lands to be used in connection with activities of the Federal Government authorized under the reclamation laws. These are: 43 U.S.C. § 945 and 417.

The Act of July 26, 1866 supplemented by that of July 9, 1870 was passed to protect water rights recognized as vested under local law and rights-of-way for "reservoirs" and for "ditches and canals" constructed over lands within the "public domain" incident to the exercise of them for "mining, agricultural, manufacturing, or other purposes." The Act has been construed as a "continuing offer" of rights-of-way for such purposes as well. The Department of the Interior and federal courts have held that the Act does not confirm rights-of-way over federal reservations.

In 1891 Congress provided means to regulate the acquisition of water rights and rights-of-way incident to them over public lands recognized in the earlier acts of 1866, 1870, and where applicable, the Desert

Land Act of 1877. The Act of March 3, 1891 continued to encourage irrigation by nonfederal entities, specifically, "any canal ditch company, irrigation or drainage district formed for the purpose of irrigation or drainage," "individuals, associations, and corporations," and later "states." The act provides that the rights-of-way granted pursuant to it shall be occupied only for the purpose for which they were approved, and the Department of the Interior construed those purposes to be limited to irrigation until the Act of May 11, 1898 broadened them to include "purposes of a public nature" and "purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation or drainage." The Act of February 26, 1897 extended the provisions of the 1891 legislation to lands earlier withdrawn by the United States as reservoir sites.

The Act of January 21, 1895 authorized rights-of-way for canals or reservoirs (and tramroads) over public lands outside National forests, parks, military or Indian reservations, to citizens and associations of citizens "engaged in the business of mining or quarrying or of cutting timber and manufacturing lumber or for the purpose of furnishing water for domestic, public, and other beneficial uses."

The Act of February 15, 1901, authorized rights-of-ways to citizens, associations, and corporations for various utility purposes including "canals, ditches, pipes and pipelines, flumes, tunnels, or other water conduits" and for "water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial use." Rights of way are not restricted to personal use by such grantees and may be utilized to supply a municipality with water. This act applies to "public lands, forests and other reservations of the United States" as well as to several National parks. Authority to grant such rights-of-way over these lands is given to the Secretary of the Interior. Authority to grant them over National forests is given to the Secretary of Agriculture. However, the Act of June 4, 1897, which generally authorizes the Secretary of Agriculture to regulate the use and occupancy of National forests, rather than the Act of February 15, 1901, is used by the Forest Service for the issuance of permits for water storage and transmission.

The Act of February 1, 1905 transferred to the Secretary of Agriculture authority previously residing in the Secretary of the Interior to grant to citizens and corporations rights-of-way across National forests "for construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals" for municipal or mining purposes.

Of the foregoing statutes, only the Acts of 1895 and 1901, require prior administrative approval of a right-of-way for water storage or transmission structures. The 1895 Act confers upon the Secretary of the Interior discretion to authorize canals and reservoirs on public lands outside of Federal reservations. The 1901 Act authorizes the Secretary of the Interior to permit rights-of-way for all manner of water facilities on public lands and Federal reservations, including forest reservations until such authority was taken from it in 1905. It conferred the same authority on the Secretary of Agriculture for lands within National forests. The Department of Interior issues "rights-of-way" under both the 1895 and 1901 Act for these purposes. The Forest Service issues "permit" for purposes authorized by the 1901 Act. Some dams and reservoirs are also authorized pursuant to "special use permits" issued by the Forest Service.

The Act of 1891 and the Act of 1901, each limit the size of a reservoir site right-of-way to the ground occupied by the reservoir plus 50 feet on each side of its marginal limits. Both limit the size of water conduit rights-of-way to the ground occupied by them, plus, under the 1891 Act, 50 feet on each side of the marginal limits, and, under the 1901 Act, 50 feet on each side of the center line of the conduit. The 1891 Act authorizes the Secretary of the Interior to award additional rights-of-way needed by the grantee to properly operate or maintain reservoirs or water conduits. All other acts are silent concerning the size of rights-of-way conferred pursuant to them.

The nature of the interest in land available under the five groups of statutes is variously described. State Courts held that the "right-of-way" confirmed by the 1866 Act was a license while the lands remained in the public domain, but an easement once the lands entered private ownership. The Department of the Interior currently characterizes the interest granted under the 1891 Act as an easement. The interest conveyed by the 1895 legislation granting "the use of a right-of-way" has been termed by both courts and the Department of Interior to be a mere license, revocable at the discretion of the Secretary of the Interior. The proviso attached to the Act of 1901 declares that rights obtained are revocable at any time in the discretion of the Secretary granting them. None of the statutes concerning rights-of-way for water prescribe a term of years during which the rights-of-way will exist.

The statutes authorizing rights-of-way for storage or transportation of water are silent concerning the right to charge money for the grants authorized. Department of Interior regulations specify that no charge will be made for a right-of-way authorized by the Act of 1891 or where the grantee is a Federal agency or the use exclusively for irrigation projects, municipally operated projects, nonprofit projects or Rural Electrification Administration projects. Otherwise, the regulations prescribe a minimum charge of \$25 per right-of-way, permit, or easement per 5 year period or the fair market value of the grant as determined by appraisal by the authorized officer, who may require in advance a lump sum or periodic payment. Forest Service policy requires at least a minimum fee for land occupancy and rights-of-way for water storage or transmission unless a nominal fee or free use is justified. The fee is generally determined by the return that could have been obtained from the acreage of land that was taken out of timber and/or grass production for water storage or transmission use. Non-commercial water storage or transmission structures which are available to the general public may qualify to use National Forest lands without charge under the Forest Service free use policy provision. Similarly, if substantial public value accrues from a reservoir or the water development is used in connection with Forest Service resource management, free use of National forest lands is permitted.

Few of the statutes concerning rights-of-way for water storage or transportation contain express conditions which must be met in order to obtain the grant authorized, though compliance with various of their provisions might be so regarded, for example the obligation to record and complete construction under the 1891 Act or the prohibition against interference with proper Government occupation of a Federal reservation or State control of water for irrigation and other purposes.

Rights-of-way vest under the 1866 Act, and in some cases under the 1891 Act upon construction.

All other statutes require administrative application and approval. Most conditions imposed upon the grant of a right-of-way under these statutes derive from administrative regulations authorized by them.

Forest Service instructions suggest that great care be taken to assure that permits issued by it under the 1901 Act or pursuant to special use permits provide for the protection of forest land resources and other Federal purposes by conditions inserted in the authorizing instrument.

2. Electric Power

The existing Federal legal system governing the disposal or use or occupancy of public lands for development, transmission, or distribution of electric energy consists of those early statutes expressly authorizing rights-of-way over public lands retained in Federal ownership for such purposes, the Federal Water Power Act of 1920 placing exclusive jurisdiction in the Federal Power Commission to license use of public lands retained in Federal ownership for hydro-electric water power development, and broad statutes making public lands available for industrial purposes generally or for public purposes generally through license, lease, or sale.

The earliest legislation enacted to authorize use of public lands for electric power purposes is the Act of May 14, 1896 which empowers the Secretary of the Interior to "permit the use of right-of-way" upon "public lands and national forests of the United States" for the purposes of "generating, manufacturing, or distributing electric power." Those eligible to obtain such permission are "any citizen or association of citizens of the United States." The Act limits the size of such right-of-way to "the extent of 25 feet, together with the use of necessary ground, not exceeding 40 acres." Congress did not expressly repeal the 1896 Act in either of the two Acts subsequently providing for electric power rights-of-way over public lands. However, it would appear to have been superceded implicitly repealed by the Act of February 15, 1901 which encompasses all authorization contained in the earlier Act and broadens its applicability as respects administering agency, width of right-of-way, description of lands subject to such use, and entities eligible to use them. The 1901 Act also imposes certain express conditions and restrictions upon the use of public lands for electric power purposes, however, that do not appear in the earlier Act. No reference to the 1896 Act is contained in current agency regulations or manuals concerning rights-of-way for electric power purposes. This further suggests that the Act, if not repealed is nevertheless not presently utilized for such purposes.

Two Federal Statutes, the Act of February 15, 1901, and the Act of March 4, 1911, provide the basic Federal statutory authorization for the use of public lands for the purposes of generation, transmission, and distribution of electrical power from the dates of their enactment until passage of the Federal Water Power Act of 1920 which is presently incorporated as part one of the Federal Power Act of August 26, 1935.

The Act of February 15, 1901, authorizes rights-of-way through the "public lands, forest, and other reservations of the United States," for "electrical plants, poles, and lines for the generation and distribution of electrical power."

Those eligible to obtain rights-of-way under the statute are citizens, associations, and corporations of the United States, and State and local governments. Federal agencies obtain rights-of-way over lands administered by another Federal agency where such agency gives its consent by memorandum of agreement or notation on public records.

The maximum size of the right-of-way is limited by statute to the extent of the ground occupied by water plants, electrical or other works authorized plus a maximum of fifty feet on each side of the margin of such works and a maximum of fifty feet on each side of the center line of any electrical lines and poles.

The Act precludes the holder of a right-of-way from obtaining any interest in the land traversed under it, declaring that any permission given by the Secretary of Interior or the Secretary of Agriculture under it "may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park." The terms of the statute are silent respecting payment for the right-of-way.

The only conditions imposed on the license by statute are prior approval of the chief officer of the department responsible for supervision of the lands concerned and a finding by him that such use is not incompatible with the public interest.

The Act of March 4, 1911 authorizes rights-of-way are "public lands and reservations of the United States" for "electrical poles and lines for the transmission and distribution of electrical power."

Those eligible to obtain rights-of-way under the statute are citizens, associations, and corporations of the United States. As is the case under the 1901 Act, no provision is made for public entities, Federal or local, to obtain such rights-of-way. The remedies for such entities are the same under both Acts.

The maximum size of such right-of-way is limited by the statute to two hundred feet on either side of the center line of electrical lines and poles.

The interest granted by the Act is designated to be an easement, limited in duration to a maximum period of fifty years and subject to forfeiture or annulment by declaration of the head of the department which granted it if it is not used for two years or if it is abandoned.

No provision concerning payment for the easement granted is contained in the act.

The only conditions attached to the grant of the easement are the conditions of precedent of approval of the chief officer of the department controlling the lands over which the easement is sought and his finding that such use is not incompatible with the public interest and the condition subsequent of continued use.

a. Administration of Power Rights-of-Way by the Bureau of Land Management. Department of Interior regulations refer applicants for generation sites for hydroelectric power projects and rights-of-way for main or primary transmission lines for hydroelectric power to the Federal Power Commission. Bureau of Land Management exercises the authority conferred on the Secretary under the 1901 Act to issue licenses for use of all public lands and reservations other than forest reservations for purposes of generation, transmission, or distribution of electric power. Lands administered by bureaus within the Department of the Interior are treated as if they were reservations administered by an agency outside the Department for purposes of applying Department of Interior regulations. These regulations require agency approval of applications filed with Bureau of Land Management for rights-of-way over land withdrawn for use of that agency.

Regardless of the maximum amount of land available for a license or easement granted under either Act, the actual size of the right-of-way granted may be considerably smaller. Department of Interior regulations provide that rights-of-way for power lines will be limited to 50 feet on each side of the centerline unless a greater width is justified and authorized by law. Authorization of a right-of-way wider than those permitted under the 1901 or 1911 Acts, can, where justified, be granted if Bureau of Land Management chooses by issuance of a special use permit.

While the 1901 Act confers only a license revocable at any time the Bureau of Land Management determines it to be in the public interest to do so, the duration of such license could last indefinitely. Termination of an easement under the 1911 Act occurs naturally at the expiration of its maximum 50-year period or a lesser period specified in the easement, unless the grantee applies for its renewal during the year preceding such expiration date in which case a second period of up to 50 years may be authorized. Termination under the 1911 Act may also occur through forfeiture or annulment of the easement for abandonment or nonuse of the right-of-way for 2 years.

No provision for payment for use of public lands for electric power rights-of-way is made in either the 1901 or 1911 Acts. Regulations of the Department of the Interior provide that the charge for use and occupancy of lands for rights-of-way, will be "the fair market value

of the permit, right-of-way, or easement as determined by the authorized officer, "and not less than \$25.00 per 5-year period of any of these forms of authorization. Rights-of-way are issued free of charge where use and occupancy are "exclusively for irrigation projects, municipality operated projects, or nonprofit or Rural Electrification Administration projects, or where the use is by a Federal Governmental Agency. "

Both the 1901 and 1911 Acts concerning licenses and easements over public lands for electric power purposes contain authority for administrative regulation of such rights-of-way. Each makes it a condition precedent of such allowance that the chief officer of the Federal department controlling such lands approve issuance of a right-of-way and render a finding that such use is not incompatible with the public interest. The Department of the Interior has promulgated regulations setting forth standard conditions with which all applicants for rights-of-way must agree to comply in order to obtain such privilege. The regulations promulgated in March 1963 by both Departments of Agriculture and Interior imposing special conditions upon the grant of rights-of-way for electric transmission lines of 33 or more kilovolt capacity are the focus of present opposition from investor-owned electric utility companies.

Grants of rights-of-way for a facility to generate electric power or to transmit or distribute electric power of 33 or more kilovolts are authorized by the Secretary of the Interior only after he determines that the proposed structure will not conflict with the "power-marketing program of the United States," or where plans for it can be modified to eliminate such conflict. Such grant then issues only subject to the additional conditions, chief of which is the right of the Department of the Interior to determine or to invoke arbitration to determine whether the applicant's transmission or other facilities have "surplus capacity" (i. e., transmission capacity in excess of that needed by the grantee for his operations) and to use such surplus capacity or to increase the capacity of the facility at the Department's expense to create a surplus capacity to transmit electric power to statutory preference customers of federal power. The grantee must maintain and operate its transmission facilities in good condition but, except in emergency or by mutual consent, may not utilize the capacity devoted to transmitting federal power. The Department pays the grantee "an equitable share of the total monthly cost of that part of the holder's (grantee's) transmission facilities utilized by the Department for the transmission of electric power and energy." If the grantee later needs any part of the surplus capacity used by the Department, he may request its return by giving 36 months notice in advance. Application of these regulations may be waived by the Department of Interior where they are superseded by a specific contract between the utility and the power marketing agency.

Objections to these regulations by the various investor-owned electric companies are made on constitutional, equitable, technological, and tactical grounds.

The Constitutional objections raised in opposition to the 1963 regulations and their predecessors concern existence of delegated legislative authority for their issuance. While the 1901 and 1911 Acts contain express authorization for the promulgation of administrative regulations to implement the use of public lands for electric utility purposes, they are silent concerning both the federal power marketing policy and the right of the Federal Government to condition use of the public lands on transmission of federal power by the grantee. Implied authorization of such provision is doubtful inasmuch as enactment of these statutes preceded the existence of a federal power program. The Supreme Court has upheld imposition of a wheeling requirement in an individual hydroelectric project works license issued by the Federal Power Commission under the Federal Power Act, where at least one of its purposes was to protect public lands. Such a purpose is also ascribed to these regulations. The avoidance of transmission line duplication is also a facet of the federal power marketing policy. The technological objections of the private electric companies to the 1963 regulations concern their effect on the ability of the industry to accurately forecast and fill systems reliability and future capacity requirements. Other objections of the investor-owned utility companies address what they consider to be inequitable burdens imposed by the 1963 regulations effecting markets for their services and the costs and profits involved in rendering them. Tactical arguments made by private utilities concern the relative need for and results of compulsory, general, and unilaterally determined wheeling provisions. It is contended that mutual, individual contractual agreements concerning wheeling are both possible and preferable.

The Department of Interior would also prefer to negotiate specific contracts for transmission of federal power if the applicant is willing to enter into an appropriate contract. Since promulgation of the 1963 wheeling regulations, neither the Departments of the Interior or Agriculture have rejected nor required modification of any application for a right-of-way over public lands on the ground that it conflicted with the federal power marketing policy and application of the wheeling stipulation requirements continues to be waived where the applicant has either a preexisting wheeling contract with the Government or will enter into one in lieu of application of the wheeling regulations.

b. Administration of Power Rights-of-Way by the Bureau of Reclamation. In addition to use of reclamation lands for electric power development by the Federal Government itself, such

lands are available to nonfederal entities, public or private, for rights-of-way for electric power purposes under the 1901 and 1911 Acts. Bureau of Reclamation policies affect the issuance of such rights-of-way. Transmission lines are usually authorized by "license," although the Bureau of Reclamation may, with the consent of the water-users organization, execute perpetual easements except where development and transmission of electric power and energy of over 100 kilovolts is involved. An easement for transmission of energy of over 100 kilovolts capacity must be submitted by the Commissioner of Reclamation to the Secretary of the Interior for approval.

The consent of the water user organization involved must be obtained for any easement proposed for a term of 25 years or longer.

c. Administration of Power Rights-of-Way by the National Park Service. Use of any national park or national monument lands for the location of powerhouses, transmission lines or any works including dams and reservoirs for development, transmission or utilization of hydroelectric power is entirely prohibited unless prior authorization from Congress for them is specifically obtained.

Rights-of-way for electric power purposes over such lands under the 1901 or 1911 Acts obtainable from the Secretary of Interior are available upon application to the Director of the National Park Service pursuant to Department of the Interior regulations. Such rights-of-way are ordinarily allowed "only on a showing of absolute necessity," and then only where the proposed location and use will not interfere with the uses or purposes to which the park or monument was originally dedicated and will not injure the natural conditions of existing property or scenery in it.

National Park Service policy governing physical developments permitted on recreational areas authorize rights-of-way from public roads across federal lands to private lands within recreational area boundaries for purposes of access and, where this is practical, permits private parties at their own expense to provide for utility lines, preferably underground which are reasonably necessary for them to use and enjoy their property. Plans for such construction must be approved by the National Park Service.

Where utility lines are necessary for national park purposes, National Park Service policy is to include them in the transportation corridor whenever possible and to place them underground except where this would cause excessive damage to the natural ecology of the area. Except where they involve existing rights recognized in legislation or agreements prior to the establishment of a natural area, or where they are authorized as being clearly in the national interest after all

reasonable alternatives have been exhausted, the installation of electric power transmission lines and other structures not directly related to national park management and visitor use is discouraged and is eliminated as rapidly as possible. When electric power transmission lines are authorized, the rights-of-way regulations of the Department of the Interior governing them apply and comparable fees are assessed for such land use.

d. Administration of Power Rights-of-Way by the Bureau of Sport Fisheries and Wildlife. Rights-of-way over wildlife refuge areas for electric power purposes are available under the 1901 and 1911 Acts, the Federal Power Act, and regulations implementing these acts. In addition, revocable "permits" may be issued without statutory authorization to permit such use where it is in the public interest to do so and it will not interfere with the operation of the refuge. Such permits are conditioned upon compliance with applicable federal laws and regulations, noninterference with wildlife refuge development, maintenance, and management, and any special terms and conditions imposed by the Bureau of Sport Fisheries or Bureau of Land Management which are not inconsistent with federal law or regulation.

The Field Manual of the Bureau of Sport Fisheries and Wildlife, Branch of Wildlife Refuges, provides that no formal right-of-way is required for the construction by the power company of a line across refuge lands if that line, after entering the refuge, is utilized only to service refuge facilities.

e. Administration of Power Rights-of-Way by the Department of Agriculture. Under the 1901 Act the Secretary of Agriculture is expressly designated to permit the use of national forest lands for rights-of-way for electric power plants and for transmission and distribution lines. The Secretary of Agriculture is also authorized as one of the heads of a federal department to grant easements for transmission lines under the 1911 Act. Though this Act only refers to transmission lines, the Forest Service manual states that easements may be issued for utility sites as well.

Pursuant to the 1901 and 1911 Acts, the Forest Service issues "permits," "easements," and "special use permits" to authorize rights-of-way over national forest lands for electric power purposes.

Under both the 1901 and 1911 Acts, any citizen, association, or corporation of the United States is eligible to seek use of national forest lands for electric power purposes upon furnishing appropriate identification. The Forest Service will issue only one transmission line permit to serve a given territory. Where more than one applicant has applied for such, preference is given to the applicant offering maximum

service and coverage, other things being equal. If equal service and coverage are offered by competing applicants preference is given to public bodies, then to cooperatives.

Within the statutory latitude allowed under either the 1901 or 1911 Act, Forest Service policy requires that the dimensions of rights-of-way be kept to the minimum required for the use specified and for the protection of surrounding lands. It does this both by limiting the number of transmission lines on these lands to those essential, i. e., one line per territory to provide the necessary service, and by encouraging the utilization of utility corridors wherever possible. Where a right-of-way of greater width than the maximum allowed by the 1901 or 1911 Acts or a right-of-way for nonprimary powerlines is required, the applicant must obtain a special use permit under the Act of June 4, 1897.

Although a right-of-way issued under the 1901 Act could last indefinitely, Forest Service policy is to fix a limited period of duration on all permits it issues; in no case will it issue an electric power permit for a period of more than fifty years. Under the 1911 Act an easement may not be issued for a term longer than fifty years.

Except where free or nominally priced use is justified, it is the general policy of the Forest Service concerning use of national forest lands for electric power sites or rights-of-way to require that the grantee pay for use of the land a fee commensurate with its value where this can reasonably be determined. Fees charged for power transmission line use are the same irrespective of whether an easement or a special use permit is obtained.

Prerequisite to a grant under either the 1901 or the 1911 Acts of use of national forest reservations is a finding by the chief officer of the department supervising or controlling it that such grant is not incompatible with the public interest. Before making such a finding the Chief of the Forest Service considers the effect of the permit or easement on national forest lands and resources, by ordering an impact analysis to be performed specifying any special provisions necessary to protect the public interest. Conditions believed necessary are secured by stipulations of the grantee incorporated in the authorizing instrument. Standard stipulations have been developed by the Forest Service for power transmission lines. Since March 23, 1963, permits or easements for electric transmission lines of 33 kilovolts or more are conditioned upon special wheeling requirements pursuant to Department of Agriculture regulations like those of the Department of the Interior. The Department of Agriculture justifies these regulations on the ground that they will produce more economical electric power transmission and reduce the need number of permanent crossings of national forests represented by parallel lines.

3. The Federal Power Act of August 26, 1935, c. 687,
49 Stat. 863, 16 U.S.C. §§ 791a-793, 795-818,
820-825

For purposes of this study it is the provisions of the Federal Power Act for the Federal Power Commission to issue licenses to construct, operate, and maintain "project works" i. e., "physical structures of a project," necessary or convenient for the development, transmission, and utilization of power across, along, from, or in any of the streams or other water bodies over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states or upon any part of the public lands and reservations of the United States which are of interest.

Under the Federal Power Act the Federal Power Commission is authorized to issue licenses to "citizens of the United States, associations, corporation, state, or municipalities. Preliminary permits may be obtained by "any person, association, or corporation." Except in instances when the Federal Power Commission has determined that the United States should develop the relevant water resource itself or where it may waive the requirements of the Act, or where priorities have been established by the issuance of a preliminary permit, applications of states and municipalities for a new license receive a statutory preference. Among all other applicants, the Commission must select those whose plans are best adapted to the public interest.

When the Commission determines that development of water resources should be made by the United States itself, it does not approve any private application affecting such development, but investigates and submits a report to Congress.

The Federal Power Commission may issue licenses for the development, transmission, and utilization of power upon any part of the "public lands" and "reservations" of the United States. Licenses on lands within "reservations" may be issued if the FPC finds that the proposed structure will not interfere with or be inconsistent with the purposes for which the reservation was created or acquired, and subject to conditions imposed by the department head administering them to assure this. More stringent restrictions are placed on lands in national parks or monuments.

No limit on the amount of land which may be granted under an FPC license is imposed by the Federal Power Act or regulations implementing it. It is within the discretion of the Commission to determine how much land will be granted initially and whether there may be any subsequent enlargements of the project area. The Commission's discretion in this area, is based solely on the standard of providing for a comprehensive plan for water development and public use.

The Federal Power Act makes express provision only for the issuance of preliminary permits and licenses by the FPC. The Act also permits the Commission to make lands available to states or their political subdivisions for rights-of-way for public highways and to the Secretary of the Interior for disposition of lands and various interests in lands under the public land laws of the United States. A preliminary permit merely maintains the permittee's priority among subsequent license applicants for a period not exceeding three years while he secures the necessary data and performs the acts required in order to obtain a license. The basic licensing provisions of the Act concern licenses which may be issued for a period not exceeding fifty years. If at the end of a license term Congress has not authorized recapture of the project works and has not determined that the project area should be given over to nonpower uses, the Commission may proceed to issue a new license for the project.

Licenses issued by the Federal Power Commission may terminate in one of five ways: upon acceptance of an application for surrender; upon expiration of the license; upon failure of the licensee to commence the project works or parts of it by the time prescribed in the license; for violation of the terms of the license; and in a war emergency.

The holder of a license issued under the Federal Power Act must pay the United States reasonable annual charges fixed by the Federal Power Commission to cover the cost of the administration of the Act and to recompensate the government for the use and occupancy of its land and other property. In setting the price the Commission tries to avoid increasing the price to the consumer of power developed and to allow for the adjustment of charges. Reasonable annual charges of not less than \$ 5.00 a year are determined by the Commission after consideration of all the facts in each case, such as commercial value, the most profitable use for the land, the beneficial purpose for which the land may be used, and other factors which the Commission may deem pertinent. Charges assessed for licenses for the development, transmission, or distribution of power by states or municipalities are reduced or waived to the extent that project works were: 1) primarily designed to provide or improve navigation; 2) power is sold directly or indirectly to the public without profit; or 3) power is used by the licensee for state or municipal purposes.

Licenses for project works of not more than 2,000 horsepower capacity to supply power for domestic mining or other beneficial use may be issued without charge except when located on Indian reservations. In no case may a license be issued without charge for the development and utilization of power created by any Federal Government functions requiring the use of public land or water or water power deriving from Government dams. A licensee under the Federal Power Act has only those powers which are specifically granted in the particular license and such powers are subject to strict construction and to the limitations prescribed by the Act. The Act itself imposes fairly detailed conditions on the licensee of a hydroelectric power project. By and large, however, the rights of a licensee under a license granted to him by the FPC are not specifically spelled out in the statute. Although the standard conditions forms of 18 C.F.R. § 2.9 are quite detailed and serve as a reference base, each license rests on its own merits and contains rights and obligations reflective of each unique licensee.

a. Electric Power Functions Outside the Jurisdiction of or Delegated by the Federal Power Commission. The power to issue licenses for hydroelectric project works on public lands and reservations resides exclusively in the Federal Power Commission under the Federal Power Act. However, the Commission has no authority to license transmission lines crossing public lands which are not part of a hydroelectric project. FPC jurisdiction is also limited to hydroelectric power generating facilities. Further, the Federal Power Commission has determined that its licensing authority for transmission lines extends only to "primary" transmission lines, i.e., lines transmitting power from the power house or appurtenant works of a project to the point of junction with the distribution system or with the interconnected primary transmission system. Finally, the FPC obtains no jurisdiction over hydroelectric project works for which rights-of-way were issued before June 10, 1920. So long as there is no change in facilities authorized prior to 1920, or rights concerning them or their ownership, the Federal Water Power Act does not affect permits issued for them by the Secretaries of Agriculture or Interior, except to authorize the holders of such rights-of-way or permits to surrender them prior to their expiration date and apply for a license from the FPC for the use involved. The advantage in doing so is that the license issued to persons surrendering rights-of-way or permits issued prior to 1920 receive more favorable terms of compensation should the Government subsequently exercise its right to take over the project for public purposes pursuant to 16 U.S.C. § 816.

The Federal Power Commission is responsible for processing applications and for issuing licenses for "minor projects," i.e., ones having less than 2,000 horsepower installed capacity and "major projects," i.e., ones having over 2,000 horsepower installed capacity. The Federal Power Commission may waive all conditions, provisions, and requirements of the Act for minor project licenses except the license period of fifty years or charges for the use of lands within Indian reservations. It may waive the provisions of the Federal Water Power Act for minor projects altogether by arranging for issuance of special use permits by the Forest Service in lieu of licenses. It has made such arrangements in the case of minor projects to be located on lands administered by the Forest Service pursuant to an informal agreement between the two agencies entered in September 1952. In these cases the project can be authorized by either terminable or term special use permits, subject to the FPC's authority to license the project if it so requires. No comparable agreement has been made between the FPC and any other Federal agency or department which administers public lands.

b. Nonpower Uses Jurisdiction Authorized Under the Federal Power Act. In addition to its principal jurisdiction over hydroelectric water power development which has been emphasized in this discussion, the Federal Power Commission enjoys some authority to allow use of public lands for nonpower purposes. Specifically, whenever it determines that all or part of any licensed hydroelectric project works should no longer be used or is no longer adapted for power purposes, it may license all or part of them for "nonpower" use. Neither the Act nor the regulations define "nonpower use" nor impose any restrictions or qualifications from which the perimeters of this term might be implied.

Additionally, pursuant to Section 24 of the Federal Water Power Act whenever the FPC determines that lands which it has reserved as power sites or lands reserved for inclusion in a proposed power project pursuant to application for a license will not be injured or destroyed for purposes of power development by location, entry, or selection under the public land laws, it may authorize the Secretary of the Interior to declare such lands open to location, entry, or selection for such purposes as the Commission determines, subject to the right of the United States, permittees, and licensees to enter, occupy, and use any part or all of the land necessary for the purposes of the Federal Power Act.

4. Communications

There are no statutes limited solely to use and occupancy provisions for communication uses. The applicable statutes authorize communication uses along with other kinds of uses, generally rights-of-way

for various purposes. The basic authorities for use of Section 10 lands for communication uses are two statutes discussed earlier in connection with electric power uses, the Acts of 1901 and 1911.

The 1901 Act, 43 U.S.C. § 959, 16 U.S.C. § 79, authorizes the Secretary of the Interior to issue regulations to permit the use of rights-of-way through the public lands, forest, and other reservations of the United States and certain named national parks for poles and lines for telephone and telegraph purposes by any citizen, association, or corporation of the United States.

The 1901 Act gives identical power to the Secretary of Agriculture to permit use of the national forests for such purposes upon approval of the chief officer supervising them and after a finding by him that such use is compatible with the public interest.

Like the 1901 Act, the 1911 Act, 16 U.S.C. §§ 5, 420, 523 and 43 U.S.C. § 961, provides authority for "poles and lines for communication purposes." It differs from that Act, however, in that it also provides for "radio, television, and other forms of communication, transmitting, relay, and receiving structures and facilities."

Electronic sites may be permitted on national forest land. While a forest supervisor may issue a special use permit for an electronic site after the regional forester has approved the site plan, only a regional forester may issue an easement for such site. A separate authorization is required for an electronic site even where it is secondary to an already authorized principal use. Easements are issued infrequently, such as in cases of large investment, and then only under circumstances which make a fixed set of conditions appropriate and where the area required is no larger than permitted under the 1911 Act. For example, easements may be granted for microwave sites and large radio and television broadcast stations. Similarly, while the 1911 Act authorizes execution of an easement for up to fifty years, it is Forest Service policy to grant easements for only twenty-five years with a right of renewal for a like period. The issuance of either instrument is subject to numerous conditions imposed for the purpose of maximizing compatible electronic uses and to harmonize them with other National Forest uses. Fees for electronic sites vary depending on the nature of the user, upward from free use.

National forest lands may also be used for community, association, or individual antenna systems whether nonprofit or commercial to facilitate local pickup of programs. Use of lands for cable right-of-way necessary for this purpose is also authorized.

Pursuant to the 1911 Act easements may be issued to permit telephone and telegraph poles and lines on national forests. Authority to issue permits for this purpose is created under the 1901 Act, but the Forest Service appears to rely upon its general authority to regulate lands for such instruments. As with other communications uses, the right to place telegraph or telephone poles and lines on forest lands is conditioned to protect the public interest in such lands.

Insofar as public lands may be needed or sought for communications uses, the programs and policies established by the Federal Communications Act of 1934 as amended become pertinent in several respects. Provisions which bear most directly on land use are the federal statutory requirements that any license for a new radio station issued by the FCC must be preceded by a permit for the station's construction. The application for a permit will include, inter alia, the proposed location of the station. In conjunction with the Departments of Agriculture and Interior, and the Director of Telecommunications Management, the FCC has devised regulations governing application for authority to construct a new broadcast station or to modify an existing broadcast station, involving the use of federal lands. While these do not apply to Government stations, similar coordinating instructions have been issued by the Intergovernmental Radio Advisory Council, and government agencies wishing to use Forest Service or Bureau of Land Management lands must coordinate and secure a site availability statement before occupancy can begin. Other provisions of the Federal Communications Act are less directly relevant to the use of public lands for communications purposes.

5. Oil and Gas Pipelines

There are hundreds of thousands of miles of oil and gas pipelines in this country and many more miles will be added in the future, many of them in already urbanized areas. Many of these lines will be on public lands and forest reserves and will be permitted under the Mineral Leasing Act of 1920, 43 U.S.C. § 962, which is the sole authority under which the Department of the Interior allows oil and gas pipelines. Military departments control oil and gas pipelines over their lands under authority of a different statute, 10 U.S.C. § 2668. Since the Secretary of the Interior's authority for oil and gas pipelines does not generally extend to acquired lands, oil and gas pipelines on lands acquired under the Bankhead-Jones Farm Tenant Act are usually handled by the Department of Agriculture, 7 U.S.C. § 551, which also uses its general authority to regulate and manage forests to issue special use permits for oil and gas pipelines.

The Mineral Leasing Act does not limit rights-of-way terms to a fixed period of years, and citizens, associations, corporations and municipalities can obtain rights-of-way. Mineral Leasing Act rights-of-way are limited to the pipeline and 25 feet on each side whereas Forest Service rights-of-way are the minimum necessary, usually not more than 10 feet on each side of the centerline. Under the Mineral Leasing Act conditions can be imposed as to location and by terms of the Act the grantee must agree to operate as a common carrier, except where common carrier obligations are imposed by the Natural Gas Act or a state or local regulatory agency. Interior, Agriculture and military department granted oil and gas pipeline rights-of-way are forfeited for failure to comply with conditions, for nonuse or for abandonment. Fees for rights-of-way are generally at fair market value.

Natural gas transmission in interstate commerce (with exceptions) is controlled by the Natural Gas Act, 15 U.S.C. § 717 et. seq. which is administered by the Federal Power Commission (FPC). Generally, location is not controlled by the FPC, though proposed regulations published in 34 Federal Register 12719 (Aug. 5, 1969) relate to the preservation of esthetic and related values in the design, location, construction and operation of project works. FPC authority is exercised through the necessity of securing a certificate of public convenience and necessity for operation or construction of facilities.

The Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. § 1671 et. seq. gives authority to the Secretary of the Department of Transportation to establish minimum federal safety standards but has little relevance to matters of location or routing.

H. Transportation Uses

1. Ground Transportation

The earliest legislation concerning a transportation use of public land was enacted in 1866. 43 U.S.C. § 932 (1964) grants a right-of-way for the construction of highways over public lands not reserved for public uses. The grant remains in abeyance until the highway is established: formal acceptance of the grant is manifested by construction of the highway or by public user in conformity with state law. The grant is of an easement. Since no action on the part of the Government is necessary to grant the right-of-way, no application need be filed. However, the statute only applies to public lands not otherwise

reserved for public uses. An application must be filed for a right-of-way over public land reserved for public uses in accordance with the general Department of Interior regulations governing rights-of-way. No charge is made for rights-of-way issued under this authority, but all holders are subject to the terms and conditions imposed by the Bureau of Land Management on holders of rights-of-way generally. While a railroad is a highway within the meaning of the statute, the statute was not widely used for railroad purposes because the decisions including railroads within the statutory authorization were not handed down until 1879.

The General Railroad Right-of-Way Act, 43 U.S.C. § 934, was passed in 1875. Prior to this time, rights-of-way to railroads took the form of special grants - specific Congressional authorization granting specifically described lands to named grantees. Under the General Railroad Right-of-Way Act, the railroad is given a right-of-way 100 feet wide on each side of the central line of the railroad, the right to take from adjacent public lands materials necessary for constructing the road and the right to use adjacent grounds for station buildings, depots and the like. The railroad must, within a specified time period, file a profile of the road. When the profile is approved by the Department of Interior, the land is subject to the right-of-way. However, no Department of Interior approval can be given until the land is surveyed. The Act provides that if any section of the road is not completed within five years after location, all rights as to the uncompleted section are forfeited. Further, the right-of-way may be terminated by abandonment, nonuse, or for violations of the terms and conditions of the grant.

Confusion regarding the nature of the railroad's interest and the effects of abandonment have created problems with respect to the railroads' conveying their interests to third parties. Although defined variously at various points in time, today the railroads who obtained their rights-of-way under the special grants are regarded as having a determinable fee and those who obtained their rights-of-way under the General Railroad Right-of-Way Act are regarded as having only an easement. In neither case could the railroad give a valid deed; however, railroads have regarded their interests as owned in fee and have conveyed their rights-of-way to third parties, raising the question whether the lease or conveyance constitutes an abandonment of the railroad's interest.

Until 1895, the Government had made no provisions for private, industrial, or commercial rights-of-way over public land. The Act of January 21, 1895, 43 U.S.C. § 956, authorizes the Secretary of Interior to permit the use of rights-of-way over public lands for

tramroads to the extent of 50 feet on each side of the centerline of the tramroad to any citizen or association of citizens engaged in the business of mining or quarrying or cutting timber and manufacturing lumber. Rights-of-way obtained under this authority are subject to the terms and conditions which apply to rights-of-way in general. A charge, based on the fair market value of the permit but not less than \$25 is made. In addition to granting rights-of-way, the Bureau of Land Management may grant "temporary rights-of-way" under this authority for a period of not more than six months. The charge is fifty cents per mile or fraction thereof per month per fraction thereof. Other than 43 U.S.C. § 956, the only specific statute authorizing the construction of private roads over public lands is 16 U.S.C. § 478 which authorizes the Forest Service to issue permits to actual settlers within the boundaries of a National forest for the purpose of constructing wagon roads necessary to reach and utilize their property.

After 1888, a series of laws (43 U.S.C. § 958, 16 U.S.C. § 525, 16 U.S.C. § 533, 25 U.S.C. § 312 and 10 U.S.C. § 2668) were passed which extend the right-of-way authorizations for highways, railroad, and tramroad uses over certain classes of land which had been excluded from the operation of 43 U.S.C. § 932, 43 U.S.C. § 934, and 43 U.S.C. § 956, "over Indian reservations, reservoir sites, national forest lands and military reservations."

With respect to public highways, Title 23 of the United States Code contains two statutes which provide for the conveyance of rights-of-way over Section 10 lands in connection with Federal aid highways. 23 U.S.C. § 107(d) provides that whenever rights-of-way, including control of access, in the Interstate System are required over lands or interests in lands owned by the United States, the Secretary of Transportation may make such arrangements with the agency having jurisdiction over the lands as may be necessary to give the state or other person constructing the project adequate rights-of-way and control of access thereto from adjoining lands. 23 U.S.C. § 317 provides that if the Secretary of Transportation determines that any part of the lands owned by the United States is reasonably necessary for the right-of-way of any highway constructed on the Federal aid primary, secondary or Interstate System or as a source of materials for the construction or maintenance of any such highway adjacent to such lands, the lands may be conveyed to the appropriate state highway department or its nominee if within four months the Secretary of the department supervising the requested land has not certified to the Secretary of Transportation that the proposed appropriation is contrary to the public interest or is in conflict with the purpose of the reservation.

2. Airports

The Act of May 24, 1928, 49 U.S.C. §§ 211-214 (1964), authorizes the Secretary of Interior in his discretion to lease for use as a public airport any unreserved and unappropriated contiguous public lands. The policy of the Bureau of Land Management is to consider airport use among the highest of land uses and, upon recommendation of the Federal Aviation Agency, to grant airport leases unless very important considerations dictate otherwise. Applications may be made by citizens, associations of citizens, corporations, states and any political subdivisions or instrumentalities thereof. The maximum area of land authorized for lease as an airport is 2,560 acres. Although the Act states that the lease shall not exceed a period of 20 years, the Bureau of Land Management policy is to grant a lease of longer duration if there are strong reasons for doing so. The lease may be renewed after the initial period. Every lessee must pay an annual rental of not less than \$10.00 for an area not exceeding 640 acres and not less than \$5.00 for each additional 640 acres or fraction thereof. Rental terms are subject to reconsideration and revision at three year intervals. The lessee is subject to a number of statutory conditions.

Additionally, the Federal Airport Act of 1946, 49 U.S.C. § 1115, authorizes the Administrator of the Federal Aviation Agency, whenever he determines that the use of any public or Federally owned lands is reasonably necessary for carrying out a project under the Act or for the operation of any public airport, to file with the head of the department or agency having control of such lands a request that such property be conveyed to the public agency sponsoring the project or owning or controlling the airport. The head of the department or agency shall then determine whether the requested conveyance is consistent with the needs of the department or agency, and shall notify the Administrator of his determination within four months after receipt of the Administrator's request. Upon a determination that the requested conveyance is consistent with the department's needs, the Secretary, with the approval of the Attorney General, shall execute the requested conveyance.

Any state, the District of Columbia, any agency thereof, any municipality or other political subdivision, or any tax supported organization may request a conveyance of property under this Act if: it plans to use the property in connection with developing, improving, or constructing a public airport; it has legal authority to accept the conveyance and to engage in the kind of development, improvement, or construction necessary to benefit from the conveyance; and it has sufficient funds to pay for the development, improvement or construction contemplated and to operate and maintain the airport.

The Administrator of the Federal Aviation Agency reviews the requests made. If he determines that the public agency requesting the conveyance is eligible and the conveyance is proper, he then files a request for conveyance with the head of the department or agency having control of the property.

Conveyance is to be made without consideration.

Conveyance is made subject to the condition that the property interest conveyed shall automatically revert to the United States in the event that the lands are not developed within three years from the date of conveyance or have ceased to be used for airport purposes for a period of six months and to other statutory conditions.

Finally, the Surplus Property Act of 1944 as carried over into the Federal Property and Administrative Service Act of 1949 authorizes the authorized disposal agency with the approval of the General Services Administration to convey to any state, political subdivision, municipality or tax-supported institution for airport purposes surplus real property which in the determination of the Administrator of the Federal Aviation Agency is essential, suitable, or desirable for the development, improvement, operation, or maintenance of a public airport. The conveyance is subject to a number of statutory terms and conditions. The Administrator of the Federal Aviation Agency has the sole responsibility for enforcing compliance with the terms and conditions of disposal. Surplus property is disposed of under this authority without monetary consideration.

3. Related Laws

The Federal highway program includes provision for roads to serve Federally owned lands. Funds for forest development roads and trails and public lands highways are allocated on the basis of need. Funds are available for construction and maintenance. Funds for the improvement of park roads and trails, parkways, and public lands development roads and trails are also available. As to forest roads, the Secretary may cooperate with states in building the roads or may construct them with his own personnel. As to public lands highways, the Secretary is authorized to cooperate with State highway departments concerning survey, construction, and maintenance. As to roads which are the sole concern of the Federal Government, or roads that can be developed in cooperation with states, Federal agencies are directed to cooperate with one another. In many cases, funds available for roads can also be expended for adjacent vehicular parking areas and for sanitary, water, and fire control facilities.

Additionally, provision is made for airports to serve Government lands. The Secretary of the Interior is authorized to acquire, establish, construct and improve, and operate airports in or in close proximity to National recreation areas when such is necessary to the proper performance of the functions of the Department of the Interior. Federal Aviation Agency standards, rules and regulations apply to the operation of such airports.

The Secretary of the Interior is further authorized to designate as National park approach roads and as supplementary parts of any of the National parks roads whose primary value is to carry National park travel and which lead across lands wholly or 90 percent owned by the Government and which will connect the highways within a National park with a convenient point on or leading to the Federal seven percent highway system. Such approach roads are limited to less than 60 miles in length between park gateway and such point on or leading to the nearest 7 percent system road or, if such road is on the 7 percent system, to 30 miles. Further, no such road may exceed 40 miles within any one county. The Secretary of the Interior is also authorized to convey to any state, county, municipality or proper agency thereof all right, title, and interest of the United States in Government owned or controlled roads leading to any National cemetery, military park, historical park, battlefield park or historic site administered by the National Park Service.

I. Military Uses

Federal statutes govern military uses of public land currently owned by the Federal Government, including the process of obtaining Federal land for such use.

Of general applicability, the Federal Property and Administrative Services Act of 1949 provides for the transfer among Federal agencies, including military agencies of certain real property found to be in excess of the controlling agency's needs, subject to the supervision of the General Services Administration, (hereinafter GSA).

Land found to be excess by military agencies, however, is first offered to the other agencies within the Department of Defense before it is made available to GSA. The Secretary of Defense has delegated to the Secretaries of the military departments authority to reassign property among activities within their departments. If the property is transferred, either the Secretary of Defense or the Federal Civil Defense Administrator, depending on the use, has complete discretion as to terms or conditions or use by the transferee.

Additionally, there are a number of specific purpose statutes. Secretaries of military departments have authority to institute condemnation proceedings for land needed for certain specific defense purposes, such as troop training or explosive manufacturing. Alternatively, the land may be purchased by the Secretaries at a price up to \$25,000.00.

The Secretary of any military department may lease any Federally-owned land under his control if such action will promote the National defense or be in the public interest. The lease is revocable at any time by the Secretary. Certain leases may not be granted without notifying the Congress. Military Secretaries may grant for any purpose if they find that such grants are not against the public interest. Revocable licenses are granted by the military Secretaries if of benefit to their departments. Permits for temporary land use are granted to other Federal agencies.

If in the best interest of the United States, military departments may acquire less than a fee interest. Compelling economic reasons are usually needed to meet the best interest standard. The Armed Services Committee of the Senate and the House of Representatives must be notified before certain leases are entered into.

Although unsupported by statutory language, the military departments characterize their temporary use of Federal land under the control of other Federal agencies as being under permit; such as use of non-Government land is described as being under lease. Much Federal land is used under permits. Joint policy agreements or memoranda of understanding between the military departments and other Federal agencies are commonly used to grant such permits.

Both the Atomic Energy Commission and the Federal Civil Defense Administration may acquire temporary interests in land. The Congressional committees on the armed forces must be notified in some instances.

Land is traditionally acquired for military use by withdrawals, reservations, and restrictions from the public domain. Up to a certain limit the power to withdraw and reserve is in the President, who has delegated his authority to the Secretary of the Interior. Over that limit, Congressional action is required.

Bureau of Land Management action may be requested by the military agencies, with the approval of an Assistant Secretary of Defense. Congressional action must be requested by the Secretary of Defense.

The military departments may acquire options on land likely to be required for a military project.

Facilities, including property interests, may be acquired for the training of reserve forces. In certain instances, prior notice must be furnished Congress.

The Departments of Agriculture and Defense after prior notification of Congress, may exchange land.

Donations of interests in real property may be accepted by the Secretary of Defense, through the GSA.

II. THE RESOURCE BASE

A. Recent and Present Patterns of Land Use in the United States

Land use trends in the contiguous United States show a steady shift from agricultural, forest and desert lands to more intensive uses. Urban and rural transportation uses have increased at the rate of almost one million acres per year since 1950. The greatest increase has come from urban use (residential, commercial and industrial); over 60% since 1950. This trend will likely continue as the urban populations increase.

B. Recent and Present Patterns of Disposed Section 10 Lands

1. Acreage of Disposed Lands by Occupancy Use: 1958-1967

A total of 542,599 acres were disposed of by Federal agencies for various occupancy uses during the period 1958-1967. The occupancy use for which the most acreage was disposed was residential amounting to 321,339 acres. The Bureau of Land Management accounted for almost 90 percent of these disposals. The Forest Service approximately 10 percent. The only other agency reporting was the Bureau of Reclamation which disposed of only 193 acres for this use. Light industrial and commercial uses accounted for the next highest volume of disposals (136,577 acres). The Bureau of Land Management accounted for all of these disposals with the exception of 36 acres disposed by the National Park Service and 7 acres by the Bureau of Reclamation. These two categories together constitute nearly 85 percent of all disposals made between 1958 and 1967. Total disposals for the other individual occupancies ranged from 6,087 acres for transportation to 30,485 acres for community uses over this 10-year period.

Disposals of lands for water transmission use were minimal, and occurred only in 1964 and 1965. There were no disposals for utility, communication or reservoir flowage purposes. Almost 99 percent of the disposals for all occupancy uses occurred in the Western States.

The amounts of acreage disposed of each year for the various uses has varied considerably. The only meaningful trend that can be discerned, is that disposals in general are declining.

2. Disposals by Applicable Law: 1958-1967

It should be noted that only three laws were used by more than one agency. These were the Townsite Acts used by both Bureau of Reclamation and the Bureau of Land Management, and the Federal Airport Act and the Exchange Acts for Consolidating National Forests, both of which were used by the Bureau of Land Management and the Forest Service.

Disposals by the Bureau of Reclamation were made under various Townsite Acts. All remaining laws were used exclusively for disposals by the Bureau of Land Management, with the most frequently used laws being the Small Tract Act and the Taylor Grazing Act.

The National Park Service disposed of only 2,800 acres during the 1958-1967 period. These were all exchanges for the purpose of consolidating holdings in various National parks.

Section 8 of the Taylor Grazing Act provided authority for disposal of 132,573 acres of public sale most of which was for residential use. An additional 108,502 acres of heavy industrial land was disposed by private exchange. Under the Small Tract Act disposals for the same period were 142,308 acres of which 138,039 acres were for residential use. The Recreation and Public Purposes Act provided authority for disposal of nearly 48,000 additional acres, more than half of which was for community use, and the balance distributed between non-Federal Government, and education/science/research uses. All other laws accounted for only slightly more than 20 percent of total Bureau of Land Management disposals.

Of the Forest Service acreage disposed between 1958 and 1967, most was for purposes of community expansion. Over 31,125 acres were disposed for this purpose under the Act of March 22, 1922.

3. Prices for Disposed Lands

Since the Federal agencies did not indicate the locations of their disposals, it was impossible to make comparisons of disposal prices. Numerous variables affect pricing structure -- such as type of land, physical features, improvements, access, existing and proposed uses adjacent development, and location. Generally speaking, Federal charges appear to be lower than State and private disposals. There was no logical explanation for this occurrence. Where policy is stated for state and private disposals, however, the charges are generally based on fair market value. Although the Federal data did not reflect

pricing policy, existing laws and regulations stipulate most disposals must be at fair market value. Consequently, variance in prices can most likely be attributed to locational variations and/or differences in appraisal techniques.

C. Recent and Present Patterns of Retained Section 10 Lands

1. Acreage of Retained Lands by Occupancy Use: 1958-1967

The best estimate of acreage in retained Section 10 lands under occupancy use is provided by combining reports of the Department of Agriculture, U.S. Forest Service, and the Department of the Interior agencies for the select years 1959, 1961, 1963 and 1965. These reports show that retained Section 10 occupancy use has increased from 2.7 million acres in 1959 to 5.8 million acres in 1965, an increase of over 200 percent. Most of this acreage is under the jurisdiction of the Forest Service (98 percent) and is located in the eastern United States. Up to three-fourths of this land has been occupied for military purposes. Other important uses have been Communication Facilities uses occupying an average of 14 percent of the total acreage each year and Reservoir Flowage uses occupying an average of nearly 10 percent of the total acreage each year. Utility use has consistently occupied between 1 percent and 2 percent of the total acreage. Utility use has experienced an actual increase of 65,000 acres in the time period indicated. Occupancy uses which appear to be decreasing in terms of acreage are residential and light industrial/commercial. All other occupancy uses either fluctuated too greatly or did not appear significant in volume in relation to the total reported acreage.

2. Acreage of Retained Lands by Tenure

Memorandums of Understanding issued by the Forest Service accommodate the greatest amount of occupancy use ranging from 1.25 million acres to 5.16 million acres of land. Next in importance are Permits accounting for up to 700,000 plus acres of land within the Department of the Interior agencies alone. The combined total acreage of the Forest Service and Department of the Interior agencies was difficult to assess for this type of tenure because the Bureau of Land Management reported Special Land Use Permits for 1967 only and the Forest Service reports did not go beyond 1965. However, if one assumes that the Forest Service acreage under permits did not decrease between 1965 and 1967, the combined total acreage under Permits was approximately 1 million acres in 1967. Occupancy use of Section 10 lands under lease arrangements occurred only within the Department of the Interior

agencies. The greatest amount of this acreage was leased by the Bureau of Sport Fisheries and Wildlife (a constant annual average of approximately 20,000 acres). Licenses accounted for very little occupancy except on Forest lands with a range of 44,000 acres to 172,000 acres. Acreage under Easements and Rights-of-Way was also low within the Department of the Interior agencies. They fluctuated from a high of 210,000 acres on Forest lands in 1959 to approximately 45,000 acres reported thereafter.

3. Charges for Retained Lands

In general, Federal, state and private retained land charges are based on fair market value in California, Montana, Oregon and Pennsylvania. At the Federal and state level there is rarely any charge for public purpose occupancy uses, in contrast private landowners are more apt to donate land for education/science/research use at no charge. Some differences are notable, for example, private land rents at higher actual dollar value, but this appears to reflect improved amenities offered. Pennsylvania state agencies are trying to discourage occupancy rights-of-way for utility uses and consequently are charging higher fees than the Federal Government or private landowners.

In general, terms and conditions of documents authorizing occupancy use are directly related to the use. For example, transportation, communication, utility occupancy is on a long-term right-of-way or easement at all levels of ownership, whereas residential, light industrial, commercial and heavy industrial use is most often accomplished under a lease for a stated period of time.

D. Expanding Communities

1. Size of Tract Most Sought After for Efficient Development

There are no generally accepted standards as to the most efficient size of tract for development of residential, light industrial, heavy industrial, heavy industrial, public service and other urban uses.

Many factors have an impact on the development process and the acreage divisions in any given city. An overriding consideration in any development endeavor, whether it be by private or public means, is the availability of land.

Market considerations play a major role in determining the size of any given development. Land costs also may have an immediate effect on

the size of tract to be developed. The land cost factor is also directly related to financing methods and the availability of money at suitable interest rates. Another major consideration is the rate of community growth and the absorption potential.

2. Composition of the Mix of Land Allocated to Uses Associated With Normal Expansion in Various Sizes of Communities

A study, published by Harland Bartholomew entitled Land Uses in America in 1955, made an attempt to determine standards of land-use allocation in central and satellite cities varying in size from less than 5,000 to over 250,000 population. This allocation analysis was based on the number of acres per 100 persons in the various sized communities devoted to residential, commercial, industrial, railroad right-of-way, parks and playgrounds, public and semipublic, and streets.

This study found that satellite cities or small communities have more acreage per 100 persons. The residential acreage ration, in particular, greatly decreases once a city's size exceeds 25,000 people. With the exception of cities of 10,000 or less population, approximately one-half acre in parks and playgrounds per 100 persons regardless of the size of the city. In this study, commercial use, with the exception of cities under 5,000 population, averaged between 1/5 and 3/10 of an acre per 100 persons. A more recent study made by Charles Abrams covered land use in seven major metropolitan regions. All had populations in excess of 500,000 and some ranged as high as 7 million. There was great variation in land-use allocation. In all cases, residential acreage represented from one-third to better than one-half of the total developed area. Commercial use ranged from 2 to 4 percent of the total area. No other standards of land use distribution were evident.

3. Examination of Five Expanding Communities

a. Alamogordo, New Mexico. Alamogordo is located in the south central part of New Mexico near the White Sands Proving Ground. It is nine square miles in size and has an estimated current population of 28,000 as compared with 21,723 in 1960. According to the Alamogordo General Plan, the population is expected to reach 57,000 persons by 1990; an additional 6.5 square miles or 4,160 acres will be needed to accommodate this growth.

Hollman Air Force Base to the west is more than six miles from the edge of the city boundary. Forest Service land adjacent to the city

boundary on the east is generally too steep for development. Although Alamogorda's future growth is restricted to some extent on both the east and west sides by the presence of these Federal lands, there is at present no necessity to expand in those directions. The remaining land suitable for urban development to the north and south consists of far more than the 4,160 acres required for the future growth of Alamogordo. With the exception of some Bureau of Land Management land, this land is privately owned.

b. Aspen, Colorado. A special census in 1968 showed the population of Aspen, Colorado to be 2,081. The town itself is located in a basin area surrounded by steep slopes. The land which is generally flat and suitable for a variety of urban uses covers an area of about 12 to 14 square miles, all of which is privately held. The heart of the town is located at the base of the Aspen Mountain, which is under the ownership of the Lincoln National Park and the Aspen Ski Corporation. In 1966, a general plan was completed for the Aspen area. In that plan a future residential development was analyzed as a step to the preservation of developed areas and to the potential of the undeveloped sectors. According to that plan the maximum holding capacity of the entire residentially designated area was estimated to be 34,650 persons.

Most of the land managed by Federal agencies is more suitable for recreation purposes such as the ski slope areas or is too rugged to permit any kind of urban development. Up to this point there has been virtually no forest land used for any kind of urban purposes. The same is true of the Bureau of Land Management land except for the 82-acre parcel which is currently in the process of being sold to the City of Aspen under the Recreation and Public Purposes Act.

In discussing Aspen's relationship to the Federal agencies, it was discovered that there had been considerable difficulties regarding the disposition of the 82-acre site administered by the Bureau of Land Management. In April of 1967, the city applied for purchase of this land under the Recreation and Public Purchase Act. According to city officials there was no established application form nor any set of instructions directing the city as to the requirements and facts to be set forth in the application. Nevertheless, the city outlined as best they could exactly what they wanted and indicated the proposed development plan. By January of 1969 final actions had still not been taken. The total time involved in this rather simple disposal had been two and a half years. The city of Aspen feels that the Bureau of Land Management has been very slow in completing this disposition. In addition,

they feel that it is incumbent on the Bureau of Land Management to set up more definite application procedures and directions for completing negotiations of this kind.

c. Flagstaff, Arizona. Flagstaff is completely surrounded by the Coconino National Forest. At the present time, the city consists of 63 square miles with only seven or eight actually in urban use. The 1969 population estimate is 26,500 and future estimate project 61,500 by 1985.

Within the corporate limits of the city, 41.2 percent or 26.36 square miles is National Forest Land. a large segment of this land is not suitable for urban use because of high elevation, rugged terrain, and water shortages. At the present time, the Forest Service has designated approximately 3,500 acres within the corporate boundaries for exchange, all of which is suitable for urban development.

In the early 1950s, there was considerable conflict between the city of Flagstaff and the Forest Service, because of the inability of the Forest Service to provide vitally needed land for public uses. The city of Flagstaff was desperately in need of school sites, a park site, and several other parcels for community purposes, but could only acquire them through the conventional exchange procedure at fair market value. This would have involved a considerable amount of money. In order to alleviate this problem the Forest Service set up special areas for school reservation and other public uses. The city has utilized the land on a temporary basis under a special use permit until such time as it can afford to acquire it via the exchange procedure.

d. Reno, Nevada. The city of Reno is located on the Truckee River in western Nevada. The city of Sparks was included in the analysis of the growth of Reno as the Sparks' city boundary is directly adjacent to Reno's on two sides and there is no perceptible difference in the two areas.

The growth of Reno took a rather sudden jump in the period between 1962 and 1965. This was the result of an influx of military personnel and an active annexation policy. In 1962, the population was estimated at 55,000 and in 1965 a special census recorded 73,200. After this period, the military population began to leave, causing a temporary decline in population. However, county planners now feel that a more natural growth is occurring and estimate the current population to be at 75,000.

The present size of Reno is 19,200 acres (30 square miles) of which approximately 8,500 acres or 44 percent is still vacant. All of this undeveloped land is quite suitable for urban uses.

Beyond the existing Reno/Sparks corporate limits is a vast amount of additional vacant land which could also be utilized for a variety of activities. Some of this land, however, cannot be considered suitable until proper flood control projects are undertaken. This is particularly true in the southeastern part of the area which will be ideal for residential development once this problem is alleviated.

Present ownership of these vacant areas does not offer any particular impediments to growth inasmuch as most of it is in private hands with the exception of some Bureau of Land Management property to the north. Forest Service lands are quite distant from the urbanizing area except for the Peavine Mountain area which has been designated as an Open Space Reserve, and there is no apparent interest in altering the status of this land.

Federal holdings on the land directly north of Sparks' current direction of growth may become a problem if the Bureau of Land Management cannot eliminate mining leaseholds which presently cloud their title. It is estimated that 400 acres in this area are suitable for residential purposes and 1,200 could be readily used for recreation. The Bureau of Land Management has indicated that it would be more than willing to dispose of this acreage under the Public Land Sales Act of 1964, but is unable to do so because of certain provisions of the Mining Act of 1872. Stuart Udall urged that this Act be repealed as one of his last acts as Secretary of the Interior. At present it precludes elimination of these old mining claims without expensive and elaborate legal proceedings.

As yet there has been no strong development pressure for the residential land, but it is bound to occur inasmuch as the land slopes gently upward from the Reno basin and offers the potential for residential development.

e. Salt Lake City, Utah. The city of Salt Lake makes up only a small portion of the greater Salt Lake Metropolitan Area (Salt Lake County) which has a current estimated population of 465,000.

Analysis of past population trends indicates that the population of Salt Lake County will be about 789,000 in 1985. Approximately 53,000 of this increase is expected in Salt Lake City and 350,000 in other parts of the County. One of the directions of the urbanization which is now occurring, is along the front of the Wasatch Forest. Salt Lake City

limits about the boundary of the Wasatch National Forest, and residential development has been moving up the foothills to the edge of the Wasatch Forest boundary. Along the major portion of this front, National Forest lands begin at places where the terrain is far too rugged to be of value for home building. However, there are a few areas which are suitable and which the Forest Service will eventually exchange provided no additional flood damage would be created by the presence of residential development. At present, however, there is an abundance of privately held land available for urban expansion. Since sentiment is so strong to maintain or even extend the Forest ownership, little further disposition of the Wasatch Front seems likely in the near future.

The major problem connected with Federal land is not based on the desire by private developers or city officials to expand urban development into the area. Rather the problem is one of managing the existing forest land so that the urban area below can survive and flourish. Unfortunately, excessive urban development on hillsides often brings devastating floods. Despite extensive flood control measures, the problem in the foothills remains.

E. New Communities

According to Urban and Rural America: Policies for Future Growth:

"New communities are large scale developments constructed under single unified management, following a fairly precise inclusive plan, and including different types of housing, commercial, and cultural facilities, and amenities sufficient to serve the residents of the community. They may provide land for industry or are accessible to industry, offer other types of employment opportunities and may eventually achieve a considerable measure of self-sufficiency. With few exceptions new communities under development today are within commuting distance of existing employment centers."

1. Number of New Communities Created and Area Absorbed

U. S. Housing and Urban Development reports indicate that during the Spring of 1968 there were some 447 planned communities on the drawing boards or in some stage of development across the nation. These communities varied in size and estimated final population. Of the 447 communities, 322 listed planned acreage totaling 1.7 million acres or an average of 5,200 acres each.

2. Population Projections for New Communities in the United States

According to the U.S. Bureau of the Census, the United States, including armed forces abroad, had an estimated population of 201,768,000 as of July 1968. Projections for the year 2000 are 335,977,000 people, an anticipated population increase of 134 million people. Assuming 30 years for development, all 447 new communities in some stage of development as of 1968 could be capable of housing a total of 20.5 million people by the year 2000. This is approximately 15 percent of the projected population increase. Again assuming an average of 12,000 acres per community when completely developed, these 447 new communities would occupy approximately 5,364,000 acres of land by the year 2000.

3. New Community Developers and the Federal Government

In the researching desirable sizes of new communities, in terms of population and land required, it became evident that expert opinion varies greatly. Desirable populations ranged from 75,000 to over 1 million. This would call for developing tracts of at least 10 square miles and more. It is clear that the successful developing entities will necessarily be large and experienced and able to withstand long term commitments without expectation of financial return for several years. These entities could include large corporations, private development corporations composed of several large corporations, nonprofit organizations, or public/private development corporations set up for specific projects. With the establishment of an overall policy related to new community development, it would be feasible for the Federal Government to work with any one or all such entities. In looking to such involvement, the entities that would be most practical for the government to deal with would be those that are the most financially stable and capable of withstanding the long-term commitment necessary for new community development.

4. Examination of A New Community

South Lake Tahoe can be considered a new community only in terms of its recent incorporation date, 1965. In reality, an active community has existed there since the turn of the century. The present full time population within the City Limits is 15,000 and the land surface of the City is approximately 8 square miles. Developed in connection with lumbering activities by five or six families, all but 360 acres within the present corporate limits of the City have always been in private hands.

The City of South Lake Tahoe does not see a need for additional Forest Service land for urban development. On the contrary, city officials feel that too much such land is being disposed. In essence, the City feels that the Forest Service is concentrating on consolidating land and using their low flat areas near the population centers and the lake as exchange parcels. The city feels it is spending a good deal of money protecting the lake for everyone and cannot afford to acquire, hold and develop available Forest Service parcels for public use.

It appears that the city does not need public land for expansion. There is sufficient room to accommodate projected population. However, the city does need more parks, schools, localized campgrounds, open spaces and other public purpose areas. The Forest Service feels land above the basin has priority for acquisition. The only real method of acquisition is through exchange. The basin lands have a very high per acre value, thus enabling the Forest Service to acquire many more acres of rugged unbuildable terrain and/or exceedingly expensive lake-front property for public beaches.

The Forest Service does not want to manage urban type recreation facilities and would like to have these lands in the hands of local public agencies for public purposes. A problem develops, however, since the city must acquire land for this purpose via market value exchange procedures and cannot utilize the Recreation and Public Purposes Act on Forest Service land. In addition, the Forest Service needs the value represented by their land in the basin areas for exchange acquisition.

5. Merits of New Communities

One of the advantages offered by new communities is planned growth and expansion. The present congestion, pollution, traffic snarls, riots and discord found in our cities in great part are the result of haphazard growth.

Dispersion of the Nation's population can be achieved through new community planning. The population of the United States has migrated to the large central cities and adjoining suburbs not so much because the overall conditions are desirable, but because that is where employment may be found. Dispersion of the population may be accomplished by planning self-contained communities that offer a balanced range of employment opportunities.

A final, and perhaps most realistic merit of new communities is an economic advantage. By planning the growth stages of a community and making allowance for population expansion such areas as streets and transportation plans, and utilities can be developed at much lower cost.

6. The Role of the Federal Government

Inasmuch as the ingredients for the success of new communities under private developers has been somewhat uncertain, an entirely new approach to community development may be necessary. A logical place to make changes is in the role of the Federal Government.

The history of urban development in this country is one based on Federal disposition of Federal lands over the entire United States for various and sundry purposes. However, there has never been an opportunity for making public land available to a corporate entity, public or private in large enough blocks for comprehensive planning and integrated development of a modern new town.

Past experience with location and development of urban areas shows that it is a consequence of the interaction of history and geography. Much is dependent upon the advantage of a place in bringing together raw material, water, power, and skilled labor in affording access to suitable markets. These kind of technical and human factors have determined almost with ironclad control the urban land use of the United States. This, of course, will continue to influence location of new communities. However, with changing needs and the possible availability of some Federal lands, we may be able to think in terms of reaching some kind of accommodation between these two factors. In short, with greater flexibility of transportation, towns are less bound to a special location than they were before. As a result, the United States is now in a position of being able to have more choice in concentrating or scattering people, centralizing or decentralizing its most vital functions. We should be careful, however, not to over estimate the potential of public lands. The possibility of utilizing these lands must be examined more thoroughly. The use of public land for new community development would most likely be only a small factor in a total National urban policy. A more critical Federal role would likely emerge from Governmental incentives to encourage: (1) developers to undertake new community developments, and (2) industry to locate in such communities.

F. Vacation Home Use

1. Vacation Home Policies

The Federal Government, some states, counties, and occasionally other local government jurisdictions, have policies of offering publically-owned land to individuals on a permit or lease basis for the purpose of constructing a vacation-home. Private holders of large

acreages of forest or water-oriented properties also offer leasing arrangements similar to Federal agency special use permits for vacation-home sites on their holdings.

All of the Federally-owned public lands available for vacation-home use through the issuance of special permits are under the authority of the U.S. Department of Agriculture (Forest Service) or under the U.S. Department of the Interior (National Park Service). The number of vacation-home sites existing on Federal lands in 1967 totalled 19,735, of which 19,324 were under permit and 411 were unoccupied. Over 99 percent of all the occupied sites are administered by the Forest Service, of which 46 percent are located in California. For this reason the vacation-home study concentrated on the policies of the Forest Service.

The present objective of the Forest Service is to continue recreation residences now occupying National Forest land under special-use permits which are at locations not needed in the foreseeable future for a higher public purpose, do not constitute a hazard to National Forest resources, and do not endanger the health, safety, or well-being of the permittee or the public. The Forest Service is reviewing all existing vacation residence tracts in order to appraise their future recreational possibilities.

The Forest Service established a priority ranking of four categories of recreation use as a basis for recreation planning in National Forests. By priority these are:

- | | |
|-------------------|---|
| Highest priority: | Sites for public recreation facilities |
| Second: | Sites for organizational recreation facilities |
| Third: | Sites for commercial public recreation facilities |
| Fourth: | Private use of public land -- vacation-home sites |

The policy regarding vacation-home sites in areas administered by the National Park Service is currently under review. No further offering of sites will be made pending completion of this review. However, transfer of permits on existing sites is allowed when title to the improvement changes ownership (by sale or inheritance), but the term allowed in such transfers is limited to the remaining period of the

original permit. This procedure allows a minimum commitment on occupancy and tenure while the policy is under review.

2. Tenure Conditions in Forest Service Permits For Vacation-Home Sites

The Forest Service has used two types of permits for vacation-home sites: terminable permits and term permits. Terminable permits were authorized by Act of June 4, 1897 and were the original type issued for vacation-home sites. They were considered more as a revokable license than a lease, although for the permittee, the permit served a purpose equivalent to a lease.

No minimum tenure was specified in terminable permits for a vacation-home site, and no expected date of termination was stated. The permits were renewed annually and automatically by payment of the specified rental fee; they were not rewritten annually or at any specified interval, only upon a change of conditions. They could be terminated upon breach of any conditions by the permittee or at the discretion of the Forest Service.

Term permits, although authorized in 1915 by the Act of March 4, 1915, were seldom used for vacation home occupancy until the 1950's. The maximum tenure for which a term permit can be issued is 30 years.

The offering of 20-year term permits to replace terminable permits on vacation-home sites was initiated to allay any misconceptions about the tenure covered by terminable permits and to meet the request of some permittees and home-owners organizations for a definite term of occupancy. The program of offering term permits was extended over a period of years (and is still in progress) because it called for a long-range review of each vacation-home tract before offering term permits to the permittees within that tract.

In January, 1969, the Forest Service issued a new policy regarding term permits. Holders of 20-year term permits may look forward to an additional extension of up to 10 years if, during the first 10 years of the 20-year term, it is determined the land will not be needed for public purposes for that additional period of time. In essence, then, the new policy is equivalent to providing a 10-year notice of termination on vacation-home sites, and of maximizing tenure to 30 years from the date permits were reissued for the site if it is feasible to retain the lands for this use. Not all permits, however, have been converted from terminable to term, partly because some permittees preferred

to retain terminable permits in the hope they might have a longer life than term permits.

Since the Forest Service originated the idea of leasing forest and water-oriented land for vacation-home sites, some states and other large holders of land have followed the example, often using conditions from Special Use Permits on Federal lands as guidelines for their own activity. However, most lessors now consider year-to-year leases out-dated. States which have evaluated programs for leasing cabin sites on their lands have either decided against leasing, started terminating their programs, or are keeping tenure extremely short and without guarantee of extension because of the need for land for public recreation.

The newer private developments that have offered leases appear to be evaluating tenure on the basis of their own needs. If tenure does not interfere with their own business use of the property, they are willing to enter into 99-year leases with other conditions of the leasehold compensating for this tenure (e.g., an initial selling price, and periodic rent adjustments to keep revenue production at prevailing levels). Also, the trend is toward creating a planned community that is recreation-oriented in order to maximize lessee interest. It would appear from contacts with these developers that lessees evaluate a 99-year term as "forever" and treat the tenure as equivalent to fee simple.

3. Charges for Vacation-Home Permits

During the early 1920's permits for vacation-home sites in National Forests carried rates of \$5, \$10, or \$15 per year. In that era there were probably no other leased lands for recreation use and little demand for them; consequently, a comparison of rates with competitive properties during these times cannot be made. However, it is an accepted fact that permits were arbitrarily set at a low rate to acquaint the general population with recreation use of wilderness and forest areas. Also, since mobility was limited both by a relatively small low proportion of automobile ownership and minimum development of road systems, the rates were intended to be low enough to overcome these limitations.

Based on a review of rates on long-established sites in several National Forests, there seems to have been only one general rate increase from the origin of permits through 1955. That one increase usually amounted to about \$5 in the annual rate, although it was slightly higher for some sites where all lots within a single area were placed on an equalized permit fee.

Annual charges for Special Use Permits on vacation-home sites on Federal lands have been undergoing review and change. Higher permit fees were levied in 1956 and again in 1962. Then, in 1963, the General Accounting Office (GAO) requested that fees for the use of public lands for private purposes be based on the fair market value of comparable lands designated for similar purposes in the surrounding area. The rate commensurate with the value of use for a recreation-residence was established by GAO as 5 percent of market value.

Following the 1963 directive of GAO, appraisals were conducted to establish land values for permit sites. The 1965 rates for permit sites, based on 5 percent of appraised values, resulted in a substantially greater increase than any previous rate increase. The rate increases, according to a sampling of records from Forest Service field offices generally ranged from \$20 to \$125 (with a few as high as \$200) within an average of about \$50 per site. However, to lessen the shock of such an abrupt increase, it was decided by the Forest Service that in the interest of public relations with permittees, the rate increase in 1967 would be phased in annual increments over a five-year period, from 1967 through 1971. Consequently, rates established in accordance with the GAO directive will not be fully realized until five years after they were determined applicable.

4. Terminations of Vacation-Home Permits

The National Park Service has not terminated any of its permits for this use while the policy is still under review. A clause in the Terminable Permits issued by the Forest Service states that a permit may be terminated for either of the following reasons: (a) breach of any conditions in the permit, or (b) at the discretion of the regional forester or the Chief of the Forest Service.

No period is specified as to the length of time between notification of termination and vacancy of the site. Since the permit is renewed on an annual basis, upon payment of the specified annual fee, it may be assumed that a one-year's notice of termination would be appropriate at the time of the last renewal of the permit. Usually in rentals the notification period coincides with the rent payment period. However, in letters to holders of terminable permits, the Forest Service states that should it be necessary to terminate the permit for reasons other than breach of any of its terms, it is Forest Service policy to give, insofar as it is possible, at least 10 years advance notice of this proposed action.

No period is specified in the terminable permit for the minimum occupancy of the site. Consequently, termination does not obligate the Government to compensate the permittee for the improvement, and permittees are notified that there will be no compensation for improvements at the time of termination.

Upon termination of the permit, the permittee is responsible for removal of the structure(s) and restoration of the site. If the permittee does not assume the physical responsibility for removal and restoration, he is liable for the cost of such work carried out by the Government.

Long-term permits are issued for a 20-year term. A clause in the permit states it may be terminated upon breach of any of the conditions in the permit. Such termination does not carry out stipulations for length of notice, compensation or other considerations.

5. Demand for Vacation Homes

While the vacation-home and vacation-home land market is undoubtedly large, there is limited information available as to its size and rate of growth. There are, for example, no precise data on the total number of vacation homes constructed in the U.S. each year and virtually no data on the number of vacation-home parcels without structures sold on an annual basis. Further, the major activity in this market has occurred in the past five years. However, an indication of the number of vacation or seasonal homes has been included in the decennial U.S. Census of Housing, and although the categories changed from the 1950 to the 1960 census, approximations can be made as to size and growth trends. Total dwellings in these categories increased from 1,177,956 units in 1950 to 2,024,381 units in 1960, a 71.8 percent increase in ten years.

Between 1950 and 1960, the number of vacation or seasonal dwelling units increased at a faster rate than occupied regular dwellings. In 1950, the ratio of seasonal to occupied non-seasonal dwellings was one seasonal for each 36 occupied units; in 1960 the ratio was one seasonal for each 26 occupied units. The increase in the number of seasonal dwellings between 1950 and 1960 averaged 84,600 annually. All regions of the country shared in the increase in seasonal homes during this period. By Census regions, the average annual increase was 22,400 in the Northeast; 23,500 in the North Central; 25,500 in the South; and 13,200 in the West.

There are a variety of factors that affect the demand for vacation home land and thus limit the size of the market. Some of the obvious are the limits imposed by the income and asset requirements of second home purchasers. For example, only a fraction of all families in the U.S. have sufficient incomes to be able to afford a second home. Mortgage lenders generally restrict loans to persons with either (1) incomes beginning at about \$15,000, with more emphasis on family incomes above \$20,000 per year, or (2) assets sufficiently high that imputed annual income from these assets plus current income approaches these figures.

Precisely how large the demand for second home land will be in the future, or whether it will grow in the future at the same rate in the past is virtually impossible to determine because of the almost complete lack of statistical information about buyers' habits and attitudes with respect to second homes. It will continue to grow if for no other reason than the fact that the determinants of demand will all continue to grow (i.e., population, income, leisure time, urban congestion, increasing numbers of retirees, interest in land speculation, consumer preferences for second homes as an outlet for recreation expenditures, etc.).

6. Supply of Land for Vacation-Home Sites

A total of 19,300 vacation-home sites in National Forests and National Recreation Areas (out of a total of 19,735 -- see Table VH-1) are under Special Use Permit. This represents 1.2 percent of the 1,550,000 second homes which were reported in the previously noted 1967 survey by the Bureau of the Census.

When distribution of vacation-home permits in National Forests and Recreation Areas is compared with both the distribution of total population in metropolitan areas, and the distribution of total seasonal housing, the impact is almost totally in the West.

Vacation-home permits on Federal land, however, supply only a very minute share of total demand -- about 1.2 percent. Also, in view of the locational concentration of vacation-home sites on Federal lands versus the concentration of population, supply of homesites in National forests could never fulfill a major share of U.S. demand for second homes. This does not mean that there has not in the past been a strong demand for sites on Forest lands. Inquiries to the Forest Service District Office and Supervisors' Offices for vacation-home permits occur at a constant rate of several hundred to a thousand or more per office per year.

Future demand, however, should be tempered by the prices recently or soon to be charged for vacation-home sites on Federal lands. The recent adjustments (according to the GAO policy) in annual rental rates based on fair market value of the unimproved parcels will probably tend to reduce demand. Further, the comparability of charges for public versus private sites should have the effect of making the consumer indifferent to selection, provided the sites were fairly similar in terms of amenities and location. In view of present trends toward private purchase of second homes for purposes other than vacation residences, the demand for sites in National Forests based on fair market value will probably decrease. Private ownership of parcels seems to satisfy the desires of users better than leasing of parcels. It is probable, therefore, that given comparability in charges, amenities and services for both public and private land, the demand will probably be satisfied by the private sector.

G. Other Uses of the Resource Base

1. Railroad Right-of-Way Uses

Because of the nature of the Government grants of land to railroad companies, much of the land underlying the railroad rights-of-way is public domain. It is therefore of concern to the Government that these lands provide maximum benefit to the public.

In order to clearly understand the present problems regarding the rights-of-way across public lands, it is important to review the exact nature of the special grants prior to 1875. Each special grant was the subject of a separate Act of Congress. The lands involved were of two types which were specifically separated in the language of the Act. In effect, each Act of Congress contained two grants. One grant was for land in fee simple without any use restrictions. This was the land given in alternate sections which were to be later sold by the railroad companies in order to provide funds for construction. The other grant was for right-of-way over which the railroad itself would pass. This included right-of-way for adjacent stations. This right-of-way grant, however, had a restriction that it be used for railroad purposes only and therefore could not be sold by the railroads. Failure to use the right-of-way for railroad purposes only resulted in an automatic reverter of the land to the United States. There are several decisions which help to clarify this distinction of two grants within one Act of Congress. The right-of-way takes effect at the time of the enactment of a statute, even though the definite location of the line of the railroad may not be made until later, Railroad Co., V. Baldwin, 103 U.S. 426 (1880).

By 1871, the estimated area of grants for Railroad purposes was 158,293,376 acres. The burden of special legislation (a separate Act for each grant), plus the enormity of this acreage granted and the mounding pressure from Homesteaders and conservationists finally resulted in a policy change in Congress as evidenced by the General Railroad Right-of-Way Act of March 3, 1875. This Act made no land grants but granted a right-of-way for one hundred feet on each side of the center line of the road, plus material, earth, stone, and timber necessary for the construction of the railroad. Included also were rights-of-way for ground adjacent to the trackage right-of-way, to be used for station buildings, depots, machine shops, side tracks, turn-outs, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

Many court cases have considered the question of what use a railroad company can make of its right-of-way where it has been determined that such right-of-way is less than fee title.

Generally, railroads have taken the position that they are entitled to use the right-of-way for "any use indispensable to, or which will facilitate the fulfillment of the objects of their corporate existence." Historically there are certain uses which if not specifically condoned, have nevertheless been allowed. These right-of-way uses fall under four general use categories: 1) rail traffic producers; 2) agricultural; 3) highways and roads; 4) utility crossings.

In addition to the four use categories which have been allowed, there is much use of railroad right-of-way for non-railroad purposes. The Coeur d'Alene, Idaho case study presented in this report lists some of these uses, i.e., a motel, hamburger stand, service station, residence, warehouses, etc. In a letter from Neal D. Nelson, California State Director of the Bureau of Land Management, there are listed various types of unauthorized occupancy use of rights-of-way, including: timber, trespass, residential use, commercial uses, mineral trespass, agricultural use, etc.

Railroad rights-of-way are being used for any and every use. Although, it is not possible to determine the extent of each type of occupancy use, various proposals have been made to obtain a detailed land status inventory of railroad rights-of-way. In each instance, it was determined that the time, manpower and cost constraints were too great to warrant such a study.

2. Military and Other Federal Government Use of Public Land

Although nearly all Federal agencies control some portion of the Public Domain, the greatest amount of Section 10 lands is under the jurisdiction and control of only a few. As a consequence, it becomes necessary for those agencies with small amounts of public land to make use of the Public Domain under the jurisdiction of another Federal agency.

When a Federal agency requires the use of public domain land controlled by another agency, it can only do so either through withdrawal or special use authorizations such as a permit, agreement, or a memorandum of understanding. The basic differences lie in the fact that Withdrawals are the only instrument whereby control of public domain land is passed from one agency to another. Use authorizations, on the other hand, allow occupancy use but do not transfer control.

The transfer of ownership is not involved in either withdrawal or use authorization use since title rest with the United States Government as an entity as indicated above.

3. Natural Areas

a. Definition of Natural Areas. A natural area is an area where natural processes are allowed to predominate and which is preserved for the primary purposes of research and education. These areas would include typical or unusual fauna and/or flora types, plant associations, and other biotic phenomena. Also included would be characteristic or outstanding geologic, pedologic, hydrologic, or aquatic features and processes. The specific objectives of a natural area system would be to preserve examples of all significant natural ecosystems and to provide educational and research areas for scientists and educators to study the ecology and successional trends of the natural environments. In addition a natural area system would serve as a gene pool for rare and endangered species. Timber cutting, grazing, recreation, mining or any other activity which artificially disturbs or disrupts the geology, atmosphere, water, soil, native plant or animal communities would not be permitted.

b. Character of Natural Area Systems. The objectives of a natural area system are synonymous with the above definition. These objectives correspond to three potential levels of a natural area system; minimum, medium or maximum. The emphasis and extent to which these objectives are to be accomplished will determine the level of system to be selected. The policy expressed in this choice will in

turn dictate the process of site selection and specific management policies.

These systems can be grouped into either of two areas of emphasis, i.e., the preservation of individual species and natural features or the development of ecosystems. The minimum system would be based on the former, while the medium and maximum systems would be developed on the ecosystem concept. This dichotomy is based on the relative needs and opportunity for conservation and research, with resource availability the prime determinant of priority and therefore of choice of a particular level of natural area system.

The minimum system, smallest in scope, would serve solely for the preservation of rare or endangered species or natural features, and thus be developed on an individual site basis. Any education or research opportunities would be contingent on overall aversion of threat and thus only incidental to a specific site. This system is indicated under conditions of greatest constraint from lack of resources.

The medium and maximum systems imply more abundant resource conditions. Freed from constraint to accomplish only what is absolutely critical, these systems afford programs larger and much more flexible in scope. While conservation needs are still met, the ecosystem basis permits optimum opportunity and benefit regarding research into plant, animal, environmental relationships.

The maximum system is essentially an expansion of the medium system, offering researchers greater variety, accessibility, and facilities for the storage of research equipment, etc.

c. Criteria for the Formation of Policy. In general there are three levels of criteria: (1) for choosing between the three natural area systems; (2) for determining priority among natural types; (3) for selecting sites. If there were an existing overall policy regarding natural areas, its emphasis and scope would be manifest in its choice of system, and the character of the system would influence type priority and site selection decisions. There is, however, no such consistent policy from which to derive these decisions. Therefore this procedure must initially be reversed-type. Priority and site selection standards will ultimately influence choice of system.

Once temporary guidelines for these two elements are established, evaluation can be made in that light regarding current efficiency of natural area land use. This, in turn, will be one of several

determinants in the selection of a natural area system. Once a comprehensive classification scheme, comprising all species and natural feature types indigenous to the U.S., has been established, these types must be ranked in priority of consideration. After type priorities have been established, sites may be selected in accordance with the process set forth for each system. Size is one criterion needing study. Few guidelines have been set down as to the minimum area required to support a type, or even its component species.

d. Acreage in Natural Areas in the United States.

In order to assess any Federal program designed to enhance or supplement a nationwide Natural Area system, it is necessary to determine the amount of acreage presently devoted to natural areas in the United States under all ownerships, be they Federal, State or private.

The United States Government established the Committee on Research Natural Areas in February 1966. This Committee's objective was to inventory natural areas established on Federal lands. As of 1968 they have published a directory, which inventories a total of 1,275,000 acres presently designated as natural areas.

There are many other public and private groups who have taken steps to preserve natural areas. These groups include states, universities and colleges, the Nature Conservancy, National Audubon Society, the Society of American Foresters, and American Society of Range Management. At various times, directories and catalogs of natural areas have been published by these and other groups; however, at present there is no published inventory of natural areas under all ownerships in the United States.

Prior to 1966 very few Federal agencies actively participated in programs for the preservation of natural areas. With the impetus provided by the Federal Committee on Research Natural Areas, however, many Federal agencies now have natural areas set aside. In 1967 the Bureau of Land Management proposed natural areas encompassing better than 700,000 acres. The National Park Service reports 106,110 acres in natural areas as of 1968. The Forest Service reported a total of 3,355 acres in natural areas for the period 1959 through 1967; however, they now have a total of 81,844 acres as reported by the Federal Committee on Research Natural Areas. Other agencies such as the Tennessee Valley Authority and the Atomic Energy Commission (AEC) have also set up natural areas. In 1967 the AEC established a reserve to protect 16,000 acres of western grassland in Richland, Washington, because the variety represented was not found elsewhere.

The total acreage derived from Federal agencies falls short of that reported by the Federal Committee on Natural Areas, however, it must be remembered that many new Natural Areas were designated in 1968 that were not included in the Federal agency reports received by this study. One factor is very evident, Aquatic, Central and Eastern Grasslands, and Other Vegetative Types appear to have very little acreage. In contrast the Bureau of Land Management proposed more than 500,000 acres in Geomorphologic type areas. This may indicate disagreement on classification, or an imbalance of type representation. Before additional land needs can be projected, it will be necessary to establish standard criteria for type classification as well as performance of a complete survey of all natural areas under all ownerships in the United States.

As shown in the previous discussion, there is no agreement on the total acreage of land presently under natural area designation. This is due to incomplete inventory based on inconsistent criteria. Consequently, no determination of the minimum area required for maintenance of each ecosystem and species in a natural state can be made. Until this is achieved, total acreage differences between the three systems cannot be computed.

Until potential sites are known it is impossible to assess acreage required to fulfill respective natural area system objectives. A very limited idea regarding present land need may be derived from the fact that 64 of the recognized forest types and 30 grassland types, currently unrepresented, would require approximately 32,000 and 30,000 additional acres respectively, based on the specifications above.

The impact of natural area needs on Section 10 lands cannot be evaluated in the absence of any consensus as to the type of land to be incorporated into a natural area system, much less where such land may be located.

III. SUMMARY OF THE PRINCIPAL OCCUPANCY USE PROBLEMS

A. Roads

There are no statutory provisions for control of access roads to mining operations subject to the general mining laws. Consequently, the development of such roads has, in many instances, resulted in destruction of natural resources on public lands.

The Federal administering agencies, however, have demonstrated the ability to control and regulate mining roads where appropriate authority exists. Under the mineral leasing laws, which provide such authority, lease provisions and departmental regulations have been developed which protect surface use of the lands, the resource and the environmental values.

B. Depletion of Timber Resources by Electrical Transmission Lines

Increasing demands for power supply are requiring increased land acquisition for right-of-way purposes. In much of the heavily forested Northwest, for example, the shortest route from power source to user is across forested lands. Over much of this route, all timber in the path of the powerline is cleared. This utility use, therefore, has a significant impact in terms of depletion of the timber resource and resultant economic and aesthetic losses. There is no specific legislation as yet to require such planning and coordination. Under existing authority and pursuant regulations, the resource manager can only impose conditions after the route has been tentatively selected by a utility company.

C. Electric Transmission Rights-of-Way Relating to the Small Tract Act

The regulations promulgated by the Bureau of Land Management, implementing the Small Tract Act, provide for the dedication of a right-of-way to be utilized for transportation and public utility uses. The Bureau of Land Management Classification Order (#465), however, limits users to Federal, State or Local Government entities, or agents thereof. Under these rulings, investor-owned utility companies may not utilize this right-of-way but must instead make application to the Bureau of Land Management for additional right-of-way under another act, as well as obtain easements from private patentees. The result is a delay in providing a public utility to Small Tract customers plus administrative cost incurred by the utility company and the Bureau of Land Management.

D. Authority to Promulgate Compulsory Wheeling of Federal Power as a Condition to Granting Electrical Transmission Rights-of-Way

In the absence of a public land policy having been enacted by Congress clearly defining the use of public lands and the relationship between the legislative and executive branches in the field of public land use, conflicts have arisen between the Department of the Interior and the utility industry over the regulations promulgated in March 1963 governing the granting of applications for electric transmission rights-of-way across public lands and through the National forests. There are instances where these regulations have discouraged the construction of new electric transmission lines. This has occurred particularly in the Southeast where utility companies, at increased cost, have rerouted their lines to avoid crossing public lands. Such rerouting, however, is not as feasible in the west where much more land is in government ownership.

At present, confusion and inconsistencies exist with the Federal Government's policy on Federal power. On the one hand, it appears that Congress has established guidelines and limitations on the authority vested in the Federal Power Commission through the Federal Power Act of 1920. In contrast, there is no single legislation which establishes guidelines as to the Department of the Interior's involvement in the Federal power field.

E. Uses Permitted Under the Act of 1911

Uses permitted under the Act of 1911 make no mention of substation sites and electrical plants. This has resulted in inconsistent policies between the Forest Service and the Bureau of Land Management regarding the granting of such uses.

F. Vacation Homes Pricing Policies and Tenure

The initial objective of vacation-home permits was to attract the general public to the forest and acquaint them with the recreation use and enjoyment of this resource. Present policy, however, is to hold vacation-home use as the lowest-priority recreation use permitted in the multiple-use concept as it yields the lowest general public benefit. Although no new site permits have been issued for several years, terminations of existing permits are occurring at a very slow rate. This is due to the fact according to the results of the questionnaire, there is no stated tenure in 64 percent of vacation-home permits, making them tantamount to permits in perpetuity with little hope for recovery for greater public benefit.

In addition, Forest Service field personnel estimate administration costs will exceed revenue received because fees charged have not been competitive with current market value. While the GAO policy of 1963 required that all fee permits of Federal land be assessed at current market value, Forest Service staged the fee increases over a five year period so that by 1970 the fees will again be below current market value.

G. Pricing Policy Regarding Land for Public Uses

For uses needed by new or expanding communities adjacent to Section 16 lands other than those administered by the Department of the Interior, there is no general provision for acquisition of land for public purposes suitable for disposal at below market rates. Thus, the communities adjacent to other than the Department of the Interior lands have no regular methods of acquisition for needed public uses such as parks, schools and other public facilities at below-market rates. Such communities have been placed at a disadvantage when they happen to be near Forest Service lands rather than Bureau of Land Management land.

H. Forest Service Land Disposal Procedures

A continuous and vital part of the Forest Service activity is acquisition and disposal of land in order to effectuate consolidation and efficient land management. The major legislative tool for doing this is through exchange. The exchange procedure, however, is cumbersome and time consuming. Lands of equal value or equal acreage to be used in an exchange are not always easy to find. Further, the procedures for review are lengthy and can result in the need for numerous reappraisals. This can not only hamper orderly disposal, but can hinder the consolidation of forest lands.

The Forest Service can dispose of land not needed for forest management by returning it to the Bureau of Land Management. This land is then classified by the Bureau of Land Management for retention or disposal. Two problems arise with regard to disposal by this method. First, there is no guarantee that the land will be classified by the Bureau of Land Management for disposal. Secondly, no monies are received by the Forest Service for this type of disposal and thus no funds are available for acquisition. This option is seldom exercised by the Forest Service.

Even in areas where use of the right-of-way by railroad lessees is considered to be within the scope of railroad purposes, higher public use priority may displace these lessees, as in cases where water and power projects condemn and relocate railroad rights-of way. The problem that ensues is one of equitable compensation to the railroads and their sublessees and a determination of who should compensate and to what extent.

Another problem linked with interest rights in rights-of-way is the prevalence of conveyances of rights-of-way made by railroad companies. These conveyances must be validated by Congress because of the reversionary interest the Government possesses in railroad rights-of-way. The cost of enacting private bills, however, is very high and must be met and assumed by the general public as taxpayers.

I. Land Exchange Procedures

Policies for Federal exchanges are unwieldy and time consuming. This results in potential delays on occupancy use disposals. Also, it deprives the Federal agencies of the opportunity to acquire certain parcels which might be desirable, since it is frequently simpler for the offerer (the private landowner) to negotiate for non-Federal lands. The problem is most critical for the Forest Service, because exchange is this agency's predominant method of disposal. Further, the data on Occupancy Use disposals indicates that all such disposals were conducted through the exchange process. The major limitations of existing policies are insufficient delegation of authority and the multitude of reviews required. The procedures should be reviewed and streamlined for efficient land management and to facilitate occupancy use disposals.

J. Conflicting Interests Regarding Railroad Rights-Of-Way

Under the special and general railroad grants of right-of-way the railroads were restricted to an exclusive right to use the right-of-way for railroad purposes only. Railroad purposes have been the subject of various interpretations by the courts. Additionally, many rights-of-way are wider than the railroad actually needed. Adjacent or underlying fee owners moved quite close to actual tracks and proceeded to build or otherwise use right-of-way land and later to subdivide and sell it. This occurred because the right-of-way was noted only in the granting statute and not in subsequent patents issued by the United States. At present, much right-of-way is used for non-railroad purposes or is not used at all.

K. Natural Area Policies

At present, there are no clear, uniform policy objectives for Federal agencies to follow in selecting natural areas. Consequently, present efforts to select and classify natural areas are without a rational basis. Further, it is unclear as to who (conservationists, scientists, the public, the government) is to benefit from the systemization of natural areas or the manner in which they will benefit. This is essential to the development of uniform natural area objectives.

IV. STATUTORY ALTERNATIVES

This section summarizes alternatives which have been suggested by various Senate and House of Representative bills or by Federal agencies to alleviate the present multiplicity of land laws relating to the disposal and retention of Section 10 lands. They suggest amendments or repeal of various statutes in order to make the existing legal system more clear, more consistent and easier to administer.

Alternative 1 suggests a comprehensive statute authorizing use and occupancy and disposal of Section 10 lands. Numerous existing legislation would be repealed, including the townsite laws, the small tract act and the isolated, rough and mountainous tracts laws. A comprehensive statute of this nature would reflect the modern views of Congress as represented in the Public Land Sale Act of 1964 and expand that concept to all Section 10 lands.

Alternative 2 would amend the laws providing for disposal of surplus Government property to state and local governments to make them clearer and more consistent. In addition, it would provide for a more uniform policy regarding price reductions to local governments by setting standards basing the amount of reduction on the degree of public benefits and comprehensive planning involved.

Alternative 3 would designate the Bureau of Public Roads as the agency responsible for coordinating planning and construction of all Federally-aided highways. Having one Federal agency rather than many dealing with the states would allow for better cooperation between the Federal government and the states.

Alternative 4 would provide for legislation designating a uniform Federal policy, making one Federal department or agency responsible for permitting use or disposals of Section 10 lands.

Alternative 5 suggests remedies to correct the present inconsistencies in existing statutes. It would establish uniform definitions for such terms as lease, easement, right-of-way, permit, license, notation, and memorandum of understanding. In addition it would establish uniform pricing policies and acreage limitations for the like uses.

Alternative 6 would establish standards for adjoining land owners applying for preference rights under Isolated and Disconnected Tracts.

Alternative 7 would give discretionary authority with limited guidelines to the Department of the Interior concerning the granting of preferences for Isolated and Disconnected Tracts.

Alternative 8 would amend charges slated for the Isolated and Disconnected Tract law to change the present wording of "not less than its appraised fair market value."

Alternative 9 would provide that charges for all section 10 lands for sale or lease to state and local governments would be at below fair market value.

Alternative 10 would clarify statutes having acreage limitations. Clarifications would be made as to whether acreage maximums are absolute or discretionary and whether closely related projects and applicants are subject to acreage maximums.

Alternative 11 would provide that section 10 lands of very great value would be sold or leased only by a specific Act of Congress.

Alternative 12 provides for a more comprehensive omnibus law for dealing with rights-of-way, easements and permits governing roads, utilities, pipelines and electrical transmission lines.

Alternative 13 would authorize the Forest Service to encourage multi-family use through condominium or cooperative forms of residential ownership.

Alternative 14 would consolidate and re-enact the townsite laws.

Alternative 15 would authorize section 10 lands classified for urban and industrial development to be made available to the states for administration and disposal.

V. PRINCIPAL ALTERNATIVES TO THE EXISTING SYSTEM

From the various alternatives developed during the course of this study, eighteen broad alternatives are given which reflect the major occupancy use problems. Two of these alternatives have to do with problems relating to Forest Service exchange procedures. Although the exchange procedure is treated in more detail in another Public Land Law Review Commission study, it has an important, even though indirect, effect on occupancy use. Since practically all disposals for occupancy uses made by the Forest Service occurred through the exchange process, it was critical that the exchange procedure be considered in discussing use and occupancy problems of disposal. The eighteen alternatives selected were made on the basis of concern as reflected through numerous Commission hearings, interviews with Federal agency personnel and state and local government and private users of the public lands.

Alternative 1, Mining Access Roads, provides for the enactment of legislation which would remove the exemptions on Federal control of mining access roads now provided by the general mining laws. Without this exemption, mining roads would be subject to existing regulations which govern other roads across Federal lands. The principal effect of this alternative would be to allow the Federal agencies to manage the natural resources in a way which will best protect the public interest. Further, it would have the effect of providing equitable treatment among all users requiring road access across public lands.

Alternative 2, Depletion of Timber Resources by Electrical Transmission Lines, proposes legislation to require that power suppliers enter into preliminary planning with timber resource managers in advance of the selection of a route across public lands on the construction of power transmission lines. The impact of this would 1) minimize depletion of the timber resource, 2) establish a framework for joint cooperative management, between the private sector as user and the Federal Government as proprietor, and 3) set a precedent for authorizing administrative control of the lands prior to the application of these lands for an occupancy use. The effect of such would be to provide maximum protection to the Forest resources to the benefit of the general public, and the commercial lumbering interest.

Alternative 3, Electrical Transmission Right-of-Way Related to Small Tract Act, would revise the Classification Order (#465) to allow private utility companies rights-of-way to serve small tracts administered by the Bureau of Land Management.

Alternative 4, Authority to Market Surplus Federal Power, would provide legislation defining the Department of Interior's jurisdiction and authority to act as the marketing agent of surplus Federal power. By clarifying congressional policy regarding the transmission of Federal power, the effect of this alternative would be to minimize conflicts between the managers of the public lands and the users of public lands.

Alternative 5, Authority to Require Wheeling Stipulations, proposes redefinment by Congress of the regulations issued by the Secretary of the Interior for granting rights-of-way across public lands. Legislation would be enacted to define the authority of the Department of Interior regarding the wheeling of Federal power and acceptable standards and limitations on this authority would be outlined. This alternative, by establishing congressional standards, would assure that the long-term objectives of the Federal Government and the private utilities are met.

Alternative 6, Uses Granted under the Act of 1911, would amend the Act of 1911 to provide for the granting of easements for substation sites and electrical plants.

Alternative 7, Vacation Homes Pricing Policies and Tenure, provides legislation giving a final date of occupancy for existing vacation-home permits and prohibiting further issuance of vacation-home permits. In addition, transfer to another permittee with attendant resale of the improvement will be prohibited. The General Accounting Office fee policy would be strictly enforced with annual fees increased to current fair market value subject to updating every five years.

Alternative 7A, provides for single term permits for vacation home sites to be issued for 25 years. At the end of the term the site would be rotated to new permittees unless required for higher public use.

Alternative 7B, would provide legislation to dispose of all vacation home sites.

Alternative 8, Rights in Termination of Vacation Home Uses on Section 10 Lands, would provide compensation at fair market value for vacation home improvements at termination.

Alternative 9, Pricing Policy Regarding Land for Public Uses, would extend the provisions of the Recreation and Public Purposes Act to all Section 10 lands. Pricing policy under this act would be re-examined and redefined to meet any new regulations. Passage of this legislation

would have the effect of enabling state and local governments to acquire federally-owned, Section 10 land administered by several departments. Further, it would increase government efficiency and enable officials to deal with land disposition and local needs more effectively. In addition, no segments of the national public would be favored over another as exists today in communities which are adjacent to Bureau of Land Management land.

Alternative 10, Meaning of Public Purpose and Public Uses, would provide legislation to define public purpose and public use in existing legislation.

Alternative 11, Forest Service Land Disposal Procedures, would authorize the Forest Service to make direct sales under the Public Land Sale Act of 1964. This alternative would have the effect of broadening the base of public land disposal procedures.

Alternative 12, Ambiguity as to Whether Retained Funds Can be Used for New Towns and Expanding Communities, would amend the Classification and Multiple Use Act of 1964 and Public Land Sale Act of 1964.

Alternative 13, Land Exchange Procedures, would revise land exchange procedures by delegating authority to regional offices and minimize review and approval procedures. The impact of this alternative would be felt primarily by the Forest Service, since exchange is presently the primary vehicle by which to conduct occupancy use disposals.

Alternative 14, Conflicting Interest Regarding Railroad Rights-of-Way, authorize the Secretary of Interior to survey granted railroad right-of-way and diminish it to that amount of land actually being used for railroad purposes. Although, the authority to diminish the land already exists in the automatic reverter clauses of the original statutes, this authorization would strengthen implementation of the statutes. The Secretary of Interior would additionally be given the authority to convey the interest of the Government to the occupant on land within the right-of-way being used for other than railroad purposes by other landowners.

Alternative 15, provides for a general quitclaim of the United States' interest in railroad rights-of-way.

Alternative 16, Designation of Railroad Companies as Agents of the United States for the Administration of Non-Railroad Use of Rights-of-Way by the Railroad Companies, would turn the administration of non-railroad uses over to the railroads. Rentals received from such use would be shared by the railroad companies and the underlying land

owners. Equitable compensation would be received by all parties possessing a property interest in the right-of-way and increased occupancy use of right-of-way would be realized.

Alternative 17, Natural Area Objectives, provides for legislation to establish uniform natural area objectives to be followed by all Federal agencies in the selection of natural area sites. It further establishes the needs of those groups which are to benefit from the system.

Alternative 18, Classification of Natural Areas, designates the Federal land administering agencies to develop uniform classifications for all major natural features, develop criteria for selecting among sites to form major ecosystems. An inventory of all natural area sites would then be conducted in cooperation with private conservancy groups.

PART 2

EXISTING LEGAL SYSTEM

Chapters III through IX describe the existing legal system for the use, occupancy and disposal of Section 10 lands. After Chapter III, which is an introductory and overview chapter, the remaining chapters generally describe the system on the basis of various kinds of uses. Chapter IV describes residential, commercial and industrial uses. Chapter V deals with state and local government uses and with community facility related use. While state and local government uses are a kind of use in one sense, the discussion varies somewhat from other chapters because the focus is on a kind of user -- state and local government -- rather than on a particular kind of use. Chapter VI covers education, science and research uses. Chapter VII, a long chapter, covers utilities -- water, power, communications and oil and gas pipelines. Chapter VIII discusses transportation uses -- airport, railroads and roads. The final chapter deals with the military. As with the section on state and local government, the military is not a use -- rather, the military discussion focuses on the uses of military lands.

CHAPTER III

INTRODUCTION AND ORIENTATION TO EXISTING LEGAL SYSTEM

CHAPTER III

INTRODUCTION AND ORIENTATION TO EXISTING LEGAL SYSTEM

This study originated with a research design prepared by the staff of Public Land Law Review Commission embodied in a work statement necessarily broad and general in outline. It has been necessary to redefine its scope to conform to available information. This section is intended to acquaint the reader with the scope of the legal investigation undertaken, the deviation from original task specifications that were necessary, and the manner selected to organize the discussion of the existing legal system.

I. SCOPE OF THE LEGAL STUDY

It has been essential to supplement this study by adopting where they were available definitions of language used but not otherwise defined from common or trade or industry usage, from relevant Federal regulations or legislative materials, from intra-agency materials, and from suggestions of Public Land Law Review Commission staff.

Numerous resources of the public lands which are the subjects of separate studies commissioned by the Public Land Law Review Commission also require various spatial uses of public lands, some of which are within the categories of spatial uses assigned to this study. In order to avoid duplication with resource studies, statutes relating to structures incident to specific resource management were generally excluded from consideration.

It was also necessary to consider in the context of statutes providing for disposal, use, and occupancy of lands for spatial purposes the meaning of the distinctions in classes of public lands described in Section 10 of the Public Land Law Review Commission Act of 1964.

For purposes of organization and description of the existing Federal legal system the meaning of certain terms were defined at the outset. "Preference rights" were construed to refer to special treatment afforded members within the class declared eligible by statute for disposal or use of public lands. "Conditions" attached to such privileges were limited to special promises or renunciations exacted of the applicant over and above the general requirements of the statute. "Criteria"

used by Federal agencies to determine whether to confer such privileges were considered to be considerations supplemental to the applicable statutory criteria. "Related laws" were those unrelated to public lands administered by agencies without jurisdiction over public lands which nevertheless affect public lands.

A. Performance of the Study of the Existing Federal Legal System

This study has directed consideration of certain basic Federal statutes concerning the disposal of public lands for specified categories of spatial uses and the identification and description of acts providing for various arrangements for use and occupancy of such lands for such purposes while title and various degrees of control remained in Federal ownership.

In describing the existing Federal legal system, primary reliance is placed on the statutes themselves, departmental regulations, and agency instructions. In a few cases, the statutes themselves contain all the pertinent information available. In most cases, because the scope of administrative discretion conferred under the statutes is large, most relevant information is contained in departmental regulations and agency instructions. Agency application forms have been consulted, and when an application form, rather than a letter and specified documents, is to be filed, the form is included as an appendix to the overview section in the case of the more important statutes and uses. Judicial and agency decisions are referred to when they are of significance to the problem under discussion. However, judicial decisions are sparse and rarely involved the administrative implementation of the statutes on an operation level. Agency decisions are not always published, and, when published, are virtually inaccessible because they lack a consistent or adequate digest or index system. Furthermore, their applicability is frequently limited to the precise problem at hand.

Because judicial and agency decisions are an inadequate source and because intra-agency material rarely supplies the link between the statutory or regulatory provisions and the instructions contained in the agency directive, any meaningful description of the policies and interpretations which guide the implementation of these statutes daily on an operational level or any arrangements concerning them which are made between various Federal agencies whose programs they affect is impossible without an empirical investigation.

B. Organization of the Study of the Existing Federal Legal System

It would be conceivable to have organized the presentation of the description of the existing Federal legal system concerning disposal, use, or occupancy of public funds for spatial purposes in a number of ways depending upon which aspect of it was of primary interest. As a "system," if such it can be termed, it is undoubtedly most intelligible if viewed historically in the context of the social and political events which generated it. If its operation were of greatest interest, a presentation organized in terms of administrative agencies empowered to implement these acts would be most desirable. If the legal rights and obligations incident to use or ownership of public lands as real property were of most significance, the discussion of these statutes would best be structured to emphasize the continuum of surrender of control over public lands for spatial purposes reflected in the spectrum of provisions ranging from sale to license of them. The Public Land Law Review Commission has determined that this study of the existing Federal legal system be organized in terms of the provisions for particular spatial uses.

Eight categories of uses have been extracted from those listed in the study work contract. These are 1) residential uses of public lands; 2) commercial and industrial uses of public lands; 3) community-facility related uses of public lands; 4) state and local government uses of public lands; 5) education, science, and research uses of public lands; 6) utility uses of public lands; 7) transportation uses of public lands; and 8) military uses of public lands.

The existing Federal legal system concerning disposal, use or occupancy of public lands for these purposes is described in chapters four through nine of this report.

Organization of the description of the existing Federal legal system concerning disposal or use or occupancy of public lands in terms of its provisions for specified spatial uses is chiefly convenient for remedial purposes. It unavoidably exposes the priorities and values which guide the present allocation of public lands for disposal, use, or occupancy, and puts in issue how well such allocation meets the current and future needs of this society. However, the selection of a use-oriented examination of this system does present difficulties in narration. The basic problem encountered in discussing the existing Federal legal system in

terms of spatial uses is that the statutes were never conceived in this way. They were enacted, or amended, or supplemented as Congress perceived the need and the means to do so. Each act varies greatly in the number of different spatial uses to which it is applicable and the relatedness of such uses to each other. Nor is a use orientation consistently imposed on the statutes as implemented.

Because the administration of the statutes is not primarily keyed to the purpose for which disposal or use and occupancy is authorized, there is a great deal of overlapping material which applies to a number of uses. In this connection, it is necessary to distinguish between those statutes, as implemented, which authorize disposal, although they may authorize the grant of some lesser interest as well, and those statutes which authorize the grant of a revocable privilege to use and occupy, although they may authorize the grant of a lease or easement which is revocable only by the terms of the instrument itself. In the case of statutes which authorize disposal, regulations and instructions generally apply whenever a given statute is invoked, regardless of use, and vary from statute to statute. In the case of statutes which authorize use and occupancy, basic regulations and instructions apply whenever a particular interest, such as a right of way, is granted, regardless of use and regardless of the statutory base upon which authority to grant such an interest is predicated.

Apart from the fact that it is most efficient to describe in one place those provisions which apply to a number of uses, it is desirable to indicate to the reader the extent to which land disposal or management policies and the consistent use of certain means of authorization for disposal or use and occupancy of public lands by a given agency exist regardless of the particular act or the particular spatial use involved. Accordingly, those provisions which are applicable to the implementation of a particular statute regardless of use in the case of statutes authorizing disposal for multiple purposes and to statutes authorizing the grant of a particular interest regardless of use in the case of statutes authorizing use and occupancy are treated together as overview sections in this Introduction.

The overview sections, treating the material which is common to a number of uses, lend themselves to a consistent internal organization. The disposal statutes are organized statute by statute. The use and occupancy statutes are organized agency by agency, then according to the particular interest granted. The primary considerations of applicant qualifications, interest and tenure, price and related terms, and conditions on use are treated under each heading. The use chapters

did not lend themselves to a common organizational scheme as the problems encountered for each use differed. For example, for purposes of clarity it was necessary to organize the residential use material basically according to those statutes providing exclusively for residential use and those statutes providing for residential as well as other uses, while it was necessary to organize the transportation use material basically according to the different types of transportation use. In the case of statutes authorizing disposal or use and occupancy for multiple purposes, only that material pertaining to applicant qualifications, interest and tenure, price and related terms, and conditions on use which is particularly relevant to the use under discussion is included. Otherwise, the material is treated in the overview sections. There is little material specifically relevant to a particular use associated with the statutes which authorize disposal for multiple purposes, and the disposal statutes treated in the use sections are generally those which authorize disposal only for the particular purpose under discussion. For this reason, the use chapters focus primarily on use and occupancy. Generally, only provisions of general applicability are included. However, details of a sub-use may be cited to illustrate the similar or dissimilar treatment of various sub-uses.

Generalizations concerning the existing Federal legal system are few primarily because the statutes themselves are old, incremental, and show little uniformity. As stated above, the statutes vary greatly in the number of spatial uses to which they are applicable and the relatedness of such uses to each other. They further vary as to whether they authorize sale; lease and sale; lease only; lease or easement and permit; or permit only. Thus, there is no clear division between statutes which authorize the grant of some interest in land and those which merely grant a revocable privilege to use and occupy land. Finally, the statutes vary widely as to the scope and specificity of their provisions and thus the amount of administrative discretion left to the agency authorized to implement them. For example, all disposal statutes contain acreage limitations, while statutes authorizing use and occupancy rarely do so. Again, most statutes authorizing disposal specify that land is to be sold to the highest bidder, at not less than appraised value, while most use and occupancy statutes are silent concerning compensation. Among the use and occupancy statutes themselves, some specify the longest period for which use and occupancy may be allowed, while others do not.

At the administrative level, there is little relationship between the provisions governing specific uses when they are authorized by different statutes and administered by different agencies. Partly because of statutory constraints, different agencies treat the same interest differently. For example, Bureau of Land Management special use permits are issued only when no specific statutory authorization exists or when an applicant is not eligible or land is not available under a specific statute. The Bureau of Reclamation issues permits primarily for the removal of material from the land, and licenses the use of land for purposes for which the Bureau of Land Management and Forest Service issue permits. Similarly, because of statutory constraints, different agencies treat the same use differently. The Bureau of Land Management, for example, may lease or dispose of small tracts for community site purpose, while the Forest Service may only permit use and occupancy for such purposes. However, the area available under a Forest Service permit for community improvements may exceed 80 acres, while only 5 acres are available under the Small Tract Act for community site purposes. And the Bureau of Land Management will not issue a permit if the applicant is eligible and land is available under the Small Tract Act.

Because of this lack of consistency in the statutes and their administration, only the most general statements can be made regarding a pattern to be perceived in the existing Federal legal system. Statutes which authorize disposal generally:

- specify acreage limitations
- make land available equally to private persons, corporations and government entities, except when disposal is authorized only for a public purpose
- provide for the disposal of lands to the highest bidder at not less than fair market value. Sale may be made to governmental entities and nonprofit corporations at less than fair market value when land is to be used for a public purpose
- provide for disposal of land without condition. However, if land is sold at less than fair market value to governmental entities or nonprofit corporations for a public purpose, provision is generally made that title will revert if the land ceases to be used for the purpose for which it was granted.

In the case of statutes which authorize use and occupancy, administrative discretion is generally exercised within the limits of statutory authorization to:

- limit the amount of land and tenure to the smallest possible necessary to exercise the privilege granted
- impose detailed conditions to protect the land involved and, in the case of withdrawn land, to insure compatibility with the purposes for which the land was withdrawn
- make the permission to use and occupy revocable at the discretion of the agency unless statutory authority provides otherwise. When permission is granted for a definite period, provision is generally made to insure that the permit can be revoked on notice if the interests of the United States require
- require compensation commensurate with the value of the use (with the possible exception of governmental agencies)
- prohibit transfer of the interest without prior agency approval
- inspect to insure compliance with the terms and conditions of the permit.

II. STATUTES AUTHORIZING THE DISPOSAL OF SECTION 10 LANDS - OVERVIEW

The following material applies whenever the disposal statute specified is invoked. The following statutes, authorizing disposal for multiple purposes, are included: The Townsite Laws of 1863, 1867 and 1874; the Act of April 6, 1906 and the Act of July 31, 1958, authorizing the disposal of reclamation and national forest land, respectively, for townsite purposes; the Small Tract Act of 1938; the Public Land Sale Act of 1964; the Recreation and Public Purposes Act of 1926; the Federal Property and Administrative Services Act of 1949; Revised Statute 2455 authorizing the disposal of isolated and mountainous tracts; and the Acts of February 2, 1911, May 20, 1920, May 16, 1930, and March 31, 1950 authorizing the sale of withdrawn reclamation land. Those statutes which authorize disposal for a single purpose only are not included here, but are discussed in the appropriate use chapters.

A. Townsites

1. Townsites on Public Lands

Among the earlist provisions for the disposition of public lands for urban settlement were the town site laws of 1863, 1867, and 1874. 1/ In addition to purposes of raising federal revenue these laws were designed to encourage the orderly development of sites suitable for towns by establishing streets, blocks, and squares adapted to the locality and to protect those occupying or desiring to occupy land within a town by enabling them to secure legal title at a nominal price. 2/ They prescribe three methods whereby lands classified for townsite purposes may be caused to be withheld from other forms of entry and made available only according to the schemes outlined.

a. Presidential Reservation. The President and, since Executive Order 10355, the Secretary of the Interior is authorized to reserve 3/ sites "on the shores of harbors, at the junction of rivers, important portages, or any natural or prospective centers of population for town site purposes. 4/ When in the opinion of the President the public interest requires it, the Secretary of the Interior is directed to cause the land to be surveyed into urban and/or suburban lots and blocks, appraised, and sold. 5/

Lots on land established as a town site by presidential reservation are to be sold at public sale for not less than their fair cash value. Notice of public sale must be given, prescribing the time, place, and terms under which the lots will be offered. An offering at public sale may be adjourned or closed. If adjourned, the unsold lots are held for future disposition at public sale. If closed, the unsold lots are subject to private sale at the appraised price. 6/

Each purchaser of a town lot at public or private sale must furnish evidence that he is a citizen of the United States or intends to become one, or, in the case of a corporation, evidence that it is validly organized and authorized to acquire and hold real estate in the state in which the town site is located. 7/ In appropriate cases, the authorized officer may limit the number of lots each purchaser may buy. 8/

b. Occupant Platting. Alternately, persons desiring to establish a town site on unreserved 9/ public lands, or persons having already done so, may have the land surveyed into lots, blocks,

streets, and alleys and file the plat and field notes, together with a statement of the extent and general character of the improvements, with the county recorder and with the Bureau of Land Management for its approval. The Bureau of Land Management may then initiate procedures for the preemptive proofs of lot claimants and the public sale of unclaimed lots. 10 /

The maximum size plat acceptable for town site purposes is 640 acres. 11 / Unlike the statute providing for townsites established by trustee discussed below, the act providing for townsites established by occupant platting contains no provision for extending the boundaries of such towns. 12 /

The public sale of lots on land established as a town site by occupant platting is conducted in the same manner as that provided for the sale of lots on townsites established by presidential reservation. 13 / However, no lot may be sold for less than the minimum price of \$10.00, 14 / and the price is increased by 50 percent if a survey is made. 15 / Further, a preemptive right of purchase at the minimum price of not more than two lots is accorded to any actual resident. 16 / Provision is made for the proof of such preemption claims: the claimant must show due publication of notice of intention to make proof of preemption; his age and citizenship; and his actual residence upon one lot and substantial improvements on the second lot if two lots are included in the application. 17 / The purchase price for the lots must be paid when preemption proof is made; and the preemption right must be exercised prior to public sale. 18 /

Again, each individual purchaser must furnish evidence of citizenship or intention to become a citizen, and each corporate purchaser must furnish evidence of valid incorporation and authority to hold real estate in the state where the town site is located. 19 / And, in appropriate cases, the authorized officer may limit the number of lots each purchaser may buy. 20 /

Town lots wholly covered by outstanding mineral patents are not subject to entry; but lots partially covered by mineral patents may be entered with the certificate and receipt excepting the portion of the lot embraced in the mineral patent. 21 / Additionally, the title to lots acquired in town sites is subject to unpatented mineral claims; paramount patents may be issued after townsite entry to mineral claimants who hold valid and prior mineral rights. However, the precedence accorded mineral claims depends upon the question of fact whether, at the date of town site entry or lot sale, the lands claimed under the mining laws were "known to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them." 22 /

Where an affirmative showing is made by the mineral claimant, his right to a patent for the land will not be prejudiced by any previous town site entry, deed, or patent covering the same land. 23 / In the absence of such a showing, the town site patent carries absolute title to minerals. 24 /

c. Entry by Trustee. Finally, when unreserved 25 / public lands have been actually settled upon and occupied as a town site, corporate authorities, if the town is incorporated, or the judge of the county court, if it is not incorporated, may enter as trustee for the benefit of the actual occupants, when the land is occupied, and for the Benefit of the community as a whole, when the land is unoccupied. 26 / Since entries may be made only for the benefit of the actual inhabitants of a town, prospective town sites may not be entered in this manner. 27 / Unsurveyed public lands upon which a town has been established may be entered by trustee: a special survey by the State Director of the Bureau of Land Management may be applied for; and when the plat is filed in the land office, application may be made to enter the land described therein. 28 / If no federal funds are available for the survey, it has been suggested that provisions for survey under provisions for entry by occupants might be used. 29 / This would permit an increase in sales price for the survey. Failure to solve the survey problem materially interfered with the possibility of entering a town site in California having ninety residences and five businesses, since the minimum bid for a survey was \$14,100.00. 30 /

Two different initiatory steps to the patenting for town site purposes are contemplated by this method: cash entry or the filing of a declaratory statement of the purpose of the inhabitants to enter it as a town site when the occupants are not ready to apply for entry. 31 / While the declaratory statement does not bind the Federal Government as a cash entry would, it will protect the inhabitants against subsequent settlers for a reasonable time. 32 /

The maximum acreage of an initial entry permitted to be made by trustee is proportionate to the number of inhabitants of the town; 33 / but if the number of inhabitants is less than 100, the town site is restricted to the land actually occupied for town purposes. 34 / Additional entries may be made of contiguous tracts occupied for town site purposes which, taken together with all prior entries, does not exceed the area which the town is entitled to as the date of additional entry by virtue of its population: 35 / In any event, the maximum area which may be entered is 2,580 acres unless the excess in area is actually

settled upon, inhabited, improved, and used for business and municipal purposes. 36 / The extension of the corporate limits of a town to include lands that cannot be entered under the town site laws and are not occupied for purposes of trade and business or laid out in streets and blocks, does not operate to segregate such land from the public domain, 37 / and the right to preemption or homestead entry within the corporate limits of a town or city but beyond the maximum area which may be entered as a town site is preserved unless the excess is actually settled upon, inhabited, improved and used for business and municipal purposes. 38 /

Town site entry by trustee is made for the benefit of the actual occupants according to their respective interests or for the benefit of the community. The execution of the trust -- the determination of the terms and conditions of sale, the disposal of lots, and the disposal of the proceeds of sale -- is conducted under regulations prescribed by the law of the state or territory in which the site is located. 39 / However, the rights of the actual occupants are vested at the time of town site entry and cannot be abridged by state regulations or by act of trustee. 40 /

Similar provisions regarding the rights of mineral claimants and the holders of mineral patents exist when entry is made by trustees as when a town site is established by occupant platting, supra. 41 / Additionally, when entry is made by trustee, the continued use and occupation for mill site purposes will defeat the rights of the claimant under the town site laws to any part of the land within the mill site. 42 /

2. Townsites on Reclamation Land

The Secretary of the Interior is authorized to withdraw from public entry any lands needed for town site purposes in connection with irrigation projects established under the Reclamation Act of 1902. The maximum permissible reservation for town site purposes in each case is 160 acres unless, in the opinion of the Secretary of the Interior, the withdrawal and disposal of sites in excess of 160 acres is in the public interest. 43 /

The Secretary's authority has been delegated to the Commissioner of Reclamation. 44 / When in the opinion of the Commissioner the public interest requires it, the reserved lands will be surveyed into town lots, with appropriate reservations for public purposes 45 / and the plat and field notes submitted to the Bureau of Land Management for its approval. 46 / With the concurrence of the Bureau of Land Management, the Commissioner may then, from time to time, authorize the lots to be appraised and sold at public sale. 47 /

Town lots are to be sold in the manner provided for the sale of town lots in sites established by presidential reservation, supra. 48/ Special provision is made for the sale of lots which remain unsold after offering at public sale has been made: such lots may be reappraised at the direction of the Commissioner of Reclamation with the concurrence of the Bureau of Land Management and are not subject to disposal until offered at public sale at the reappraised value. 49/ Payment of the purchase price in not more than five annual installments may be authorized in the sale order. 50/

Each individual purchaser must give evidence of citizenship or intention to become a citizen; and corporate purchasers must be given evidence of valid incorporation and authority to acquire and hold real estate in the state in which the town site is situated. 51/ In appropriate cases, the authorized officer may limit the number of lots each purchaser may buy. 52/

Up to twenty acres per township in each reclamation project may be reserved for public purposes -- for use as country parks, public playgrounds, and community centers. 53/ Such reservations are to be improved and maintained by the town authorities at the expense of the town, and will be conveyed to the municipality upon its organization as a municipal corporation. 54/ Similarly, up to six acres within any town site -- after survey, town lot subdivision, and reservations for public purposes are made -- may be conveyed to the officials of a school district which lies wholly or partly within the bounds of the reclamation project for uses as school buildings and grounds. 55/

While the patents issued conveyed all the right, title, and interest of the United States in or to the land sold, 56/ conveyances of public reservations to municipal corporations and conveyances to school districts provide for the reversion to federal ownership if the lands cease to be used for the purposes authorized. 57/

3. Townsites on National Forest Lands 58/

Finally, the Secretary of Agriculture is authorized to reserve for town site purposes national forest lands and submarginal lands administered as part of national forest lands upon a satisfactory showing of the need for such by any existing, petitioning county, city, or other local government subdivision. 59/ An application may be in the form of a letter addressed to the Forest Supervisor or a resolution passed by the governing body of the local government subdivision. 60/ Townsite designations can be rescinded in whole or in part if the area is no longer needed for townsite purposes. 61/

The Secretary's authority has been delegated to the Chief of the Forest Service, 62/ who has redelegated his authority to the Deputy Chief for National Forest Protection and Development. 63/ Designations for town sites will be made to meet urban needs for private ownership for residential or business purposes that cannot adequately be met by other means, and will be made only after public notice. 64/ Criteria include a showing that:

- (a) sewer, water and other facilities will be provided;
- (b) the lands are suitable for subdivision;
- (c) urban uses will not unduly increase risk of forest fires or cause undue erosion to adjacent areas;
- (d) sanitation problems are not created;
- (e) the lands are not needed for federal purposes, and;
- (f) state and local laws can be met, 65/ including state survey requirements. 66/

Generally, a town site will not be designated for summer home or non-urban commercial-use areas. The present or probable existence of year long residences, and of facilities such as churches, schools, water and business establishments must be shown. 67/ Mineralized areas and those subject to valid mineral claims are not normally included in a townsite. 68/ Townsite areas are excluded from mineral entry and doubtful mineral claims and locations are resolved. 69/

Not less than five acres nor more than 640 acres will be considered in any one application for a town site to be added to an adjoining town and not less than forty acres nor more than 640 acres will be considered in one application for a town site as a separate entity. 70/ Lot sizes should be generally conformed to those established for adjacent subdivisions in the area. 71/

Areas designated as town sites may be divided into town lots and offered for sale by the Chief at public sale to the highest bidder for not less than the appraised value, which is the fair market value of the interest. 72/ Lots are individually appraised though those of equal value may be grouped. 73/ Lots thus offered which are not sold at the public sale may then be sold at private sale for the higher of the price bid or their appraised value. Lots on which improvements have been constructed under permit or other federal authorization shall first be offered to the permittee at the appraised price. 74/ Groups of lots under special

permit will be included in the town site only if by two-thirds vote the permittees agree to purchase their lots. 75/ If not purchased at the appraised price, the special permittee must be highest bidder to purchase the property. If not a successful bidder he must remove his improvements. 76/

Any person, private corporation, firm or agency is eligible to purchase town lots. Individuals must give proof of citizenship or declare their intention to become citizens; and corporations must give evidence of valid incorporation and authority to hold real estate in the state in which the land is located. 77/ Nor more than three town lots may be sold at either public or private sale to any person or private corporation, firm, or agency. 78/ Governmental bodies can acquire as many town lots as needed for public purposes. 79/

B. Small Tract Act of 1938 80/

The Small Tract Act of 1938 authorizes the Secretary of the Interior to sell or lease any unreserved public lands 81/ which he may classify as chiefly valuable for residence, recreation, business or community sites. 82/ When the lands are under the jurisdiction of any agency other than the Bureau of Land Management, that agency must concur in the Bureau of Land Management's proposal for classification. 83/ No lands will be sold or leased under the Act until classified for small tract purposes. 84/

1. Classification Criteria

Classification may be initiated by application and petition if the lands applied for have been previously announced in the Federal Register to be open for filing, or by the classification officer of the Bureau of Land Management on his own motion. 85/ In either case, the classification officer will undertake such investigations as are necessary to determine whether the lands are suitable for lease or disposal as small tracts. If after investigation he finds them to be suitable for small tracts, the officer will classify the lands for small tract purposes. The lands will be closed to small tract application if they are classified or disposed of for a higher use or appropriated under the mining laws, if the demand for lands under the Small Tract Act no longer exists in the area, or if the application privilege has been abused. 86/

In classifying lands for small tract purposes, current Bureau of Land Management policy stresses consistency with the aims of the Classification and Multiple Use Act of 1964, with the small tract objectives set forth in the Department of Interior regulations to the Small Tract Act, and with the small tract program directive in 5 Bureau of Land Management 3.1. 87/

Department of the Interior regulations to the Classification and Multiple Use Act of 1964 provide that lands determined to be valuable for residential, commercial, agricultural, or industrial purposes may be classified for disposal under any appropriate authority other than the Public Land Sale Act of 1964 if such disposal would be consistent with local government comprehensive plans or views. 88/ Accordingly, current Bureau of Land Management instructions provide that all small tract openings and offers must be consistent with local zoning and local master plans; where such plans do not exist, openings and offers must be consistent with local government activities. 89/ Further, the instructions provide that all small tract classifications must adhere to modern concepts of urban and suburban land use planning. 90/ The Small Tract Act is not used as a subdivision statute, 91/ except where leases only, without option to purchase, are employed. 92/

Department of the Interior regulations to the Small Tract Act provide that small tract sites will be considered in the light of their effect on the conservation of natural resources and on the communities or areas involved. 93/ Lands will not be classified for small tract purposes if, such classification:

- (1) adversely affect conservation of natural resources or resource management programs;
- (2) adversely affect communities or local areas by introducing isolated or scattered settlement imposing heavy burdens for roads, school, health, police and fire protection, types of settlement not desired by the community or area, or conflict with community or area plans of development;
- (3) result in private ownership or control of scenic attractions, shorelines, or other resources which should be kept open to public use;
- (4) lead to undesirable construction along public highways, parkways, or scenic area;
- (5) unreasonably interfere with the use of water for grazing purposes or unduly impair watershed protection;
- (6) adversely affect existing economic enterprises;

- (7) involve an area more suitable for disposition under other laws; or
- (8) conflict unduly with the development of mineral resources where the mineral values are appreciable. 94/

Subject to these criteria, lands may be classified for small tract lease or sale if they are more suitable for such classification than for any other form of use or disposal under the public land laws, provided they are chiefly valuable as sites for: residence, either year-round or seasonal; business enterprises, including both commercial and industrial enterprises; recreation, including camping, picnicking, hunting, fishing, playground activities, etc; or community facilities, including churches, meeting halls, town halls, public parks and playgrounds, utility sites, etc. 95/

Lands classified for small tract purposes may be classified for lease only, for lease and sale , or for direct sale. 96/ Lease with option to purchase classifications will generally be made only where there is a demonstrable need for the protection of valuable properties or of the community as a whole, or where it can otherwise be shown that the public interest would be jeopardized by direct sale. 97/ Lands will normally be classified for lease only where sale is not in the public interest, e. g. "where limited improvements or limited use is permissible on lands possessing public recreation values or where leasing is the only alternative under the circumstances, e. g., where the using agency has stipulated limitations. 98/

2. Provisions Governing Disposal

Except where land has been classified for direct sale at public auction, any person who desires to purchase or lease land for small tract purposes must file an application. 99/ The applicant must certify that he has personally inspected the small tract described in his application or lands within one mile of the tract.

Where lands have not been classified, a petition for classification must accompany the application. 100/ The first person to apply for unclassified lands has a preference right to lease or purchase when the lands are subsequently classified and the applicant conforms his application to the specifications of the classification order. 101/ If the senior applicant fails to comply with any requirement, the next junior applicant in line will be treated as the senior. 102/

Small tracts may be disposed of to individuals, partnerships, or associations meeting the usual citizenship requirements; to corporations, both profit and non-profit, authorized to do business where the land is located; and to a state, territory, municipality, or other governmental subdivision. However, only non-profit corporations and associations and government bodies may apply for land for community site purposes. 103/

Land is to be sold in five-acre tracts except where the subdivision of a fractional lot would leave areas unsuitable for practical use. In such cases, the lots will be subdivided to produce usable units of not more than seven and one-half acres.

Generally, no person or organization may purchase or lease more than one tract. However, when more than one tract is needed, each tract may be the subject of a separate application if accompanied by a satisfactory showing that the allowance of more than one application is warranted by the circumstances. 104/ Such a showing must demonstrate: the applicant's good faith, e. g., a change of residence, lack of access to the original tract; that the purpose for which the second tract is requested shows a need which can logically be met by the tract sought; and that acquisition of a second tract for the purposes indicated will result in a use consistent with good land management practices. 105/

a. Disposal of Lands Classified for Lease or for Lease and Sale. The terms of the lease and sale are specified in the classification order. The term of lands classified for lease only may not exceed twenty years, but the lease may be renewed on a showing that the lessee has constructed substantial improvements. The term of lands classified for lease and sale may not exceed three years; but, again, the lease may be renewed on a showing that the lessee's failure to meet the requirements for sale is justified under the circumstances. 106/

Rental for all sites, except community development sites, is based on the fair market value of the lands, with a minimum rental of \$100.00 per year for business sites and \$25.00 per year for other sites. Rental for community sites will take into consideration the purpose for which the land is used. 107/

If the lease term does not exceed five years, advance payment of the rental for the entire lease period as specified in the classification order must accompany the application; if the lease term does exceed five

years, the amount of advance payment will be specified in the classification order. If lands have not yet been classified, payment is \$25.00 for non-business and \$100.00 for business site applications. 108/

Lands classified for lease and sale contain an option to purchase clause. The net purchase price of lands so classified is the appraised fair market value of the unimproved land as of the date of the lease, less an amount equal to the advance rental for each full lease year subsequent to the filing of an allowable application to purchase. An application to purchase must be filed together with a statement of the improvements constructed on the land. If sale is authorized, the applicant must pay the net purchase price within sixty days from service of notice. 109/ Leases may not be assigned unless and until approved by the Bureau of Labor Management, and assignments will not be approved until suitable improvements are constructed unless the lessee can demonstrate his failure to construct improvements was caused by unavoidable and unforeseen circumstances. Subletting of a tract, in whole or in part, will not be approved. 110/ Any lease may be cancelled for failure to comply with its terms, conditions, and covenants. 111/ In particular, leases which are issued for periods in excess of five years provide for the construction of improvements during the first five years of the lease period and may be cancelled for failure to comply with this requirement. 112/

b. Disposal of Lands Classified for Sale. Lands classified for direct sale are sold to the highest bidder at public auction in the manner specified in the classification order, but for not less than their appraised fair market value. Each bid must be accompanied by an advance payment in the amount of the applicant's bid. 113/ Lands suitable for community site development may be sold for less than their fair market value if it is determined that the public use justifies such action. 114/ When lands classified for community site purposes are sold for less than their fair market value, the conveyance will contain a provision for reversion of title to the United States, if the lands are used for any purpose not consistent with the classification order unless consent to the change in use is first obtained. 115/

Any lease or patent issued under the Act will reserve mineral rights to the United States. Once classified for disposal, a patent for a previous mining claim cannot be issued, but this does not affect the validity of the claim. 116/

The classification order may provide for rights-of-way over each tract for street and road purposes and for public utilities. 117/ If the classification order does not so provide, the right-of-way will be fifty feet along the boundaries of the tract. 118/

C. Sale of Public Land Act of 1964 119/

Pending implementation of recommendations to be made by the Public Land Law Review Commission, the Sale of Public Land Act of 1964 directs the Secretary of the Interior, in addition to any other authority he may have, to dispose of public lands, 120/ that have been classified for sale under the Classification and Multiple Use Act of 1964 in accordance with a determination that the lands are required for the orderly growth and development of a community or are chiefly valuable for residential, 121/ commercial, 122/ industrial, 123/ agricultural, or public uses or development. 124/

1. Criteria Governing Disposal Under the Act

Department of the Interior regulations to the Classification and Multiple Use Act set forth general criteria governing classification for sale under the Sale of Public Land Act and other laws authorizing the Secretary of the Interior to dispose of public lands. Such classification may be initiated by the Classification Officer of the Bureau of Land Management on his own motion or by the applicant on petition. 125/

Consideration will first be given to whether the lands are needed for urban and suburban purposes or whether they are chiefly valuable for public purposes, i. e., suitable for use by or for the benefit of government or noncommercial entities or programs. Lands found to be valuable for public purposes unless alternate sites are available to meet the public needs. Such lands will be classified for disposal under the Act if: adequate zoning regulations exist in the area in which the lands are located; and the proposed use involves profit activities or the interested governmental agency and the authorized officer agree that there is no need for the perpetual dedication of the land to public uses. Such lands will ordinarily be classified for lease and sale under the Recreation and Public Purposes Act if the uses involve nonprofit activities and if it is determined by the authorized officer that the provisions of the Act require the continued dedication of the land to such uses or to otherwise carry out the purposes of the Act. 126/

To be needed for urban or suburban purposes, it must be anticipated that a community will embrace the lands within fifteen years. Lands needed for urban or suburban purposes may be classified for sale under the Act as being required for the orderly growth and development of a community if adequate zoning regulations are in effect and adequate local government comprehensive plans have been adopted, or may be

classified for disposal under any other appropriate law if such disposal would be consistent with local comprehensive plans or, in their absence, with the views of local government authorities. Where more than one form of disposal is possible, that course will be selected which will best promote the development of the land for urban or suburban purposes. 127/

Lands which have value for residential, commercial, agricultural, or industrial purposes will be considered chiefly valuable for that purpose which represents their highest and best use. Such lands may be classified for sale under the Act if adequate zoning regulations are in effect and, where the lands are also needed for urban or suburban development, if adequate local government comprehensive plans have been developed. Such lands may be classified for disposal under any other appropriate law if the disposal would be consistent with local government comprehensive plans or, in their absence, with the views of local government authorities. 128/

Lands which are chiefly valuable for purposes other than those specified above and which are not suitable for retention for multiple management may be classified for disposal under any applicable authority. 129/

Disposal under the Sale of Public Land Act thus depends on the existence of zoning regulations and, where lands are required for the orderly growth and development of a community (urban and suburban purposes), adequate comprehensive local government plans. 130/

To be considered adequate, comprehensive plans and zoning regulations must provide for necessary land use. Comprehensive plans must be sufficient to provide the means for determining the proper uses of individual tracts within the areas covered by the plan; and zoning regulations must be sufficient to enable local authorities to prescribe the proper use and terms and conditions of use of lands and to enforce the zoning restrictions and; the terms and conditions of use. 131/

While no sale may be conducted under the Sale of Public Land Act until zoning regulations have been enacted, 132/ provision is made, whenever disposal is contemplated under the Act, for at least ninety days notice to be given to the head of the governing body of the political subdivision of the state having jurisdiction over zoning in the geographic area within which the lands are located to afford the appropriate body an opportunity to zone for the use of the land in accordance with local planning and development. 133/

2. Provisions for Disposal Under the Act

Lands classified for sale under the Act may be disposed of to qualified agencies and qualified individuals. Qualified governmental agencies include the following, their lawful agents and instrumentalities: the state, county, municipality, or other local government subdivision within which the land is located and any municipality within convenient access to the lands if the lands are within the same state as the municipality. Qualified individuals include any individual who is 21 or over and who is a citizen or declares his intention to become a citizen, any partnership or association, each of the members of which is a qualified individual as above, and any corporation validly organized and authorized to hold title to real property in the state in which the land is located. 134/

Lands are to be sold in tracts not exceeding 5, 120 acres to qualified governmental agencies at their appraised fair market value or to qualified individuals through competitive bidding at not less than their appraised fair market value. 135/

Before entering into an agreement with a governmental agency or opening bids from individuals, at least thirty days notice of the offering of lands for sale shall be published in the Federal Register and in a newspaper of general circulation in the area in which the lands are situated. 136/ If the lands are offered through competitive bidding, the date, time, place, and manner of submitting bids are to be specified in the notice. 137/

When lands are offered through competitive bidding, the acceptance of an offer to purchase will be by issuance of a final certificate to the highest qualified bidder. Until the final certificate is issued, the authorized officer has the right at any time to determine that the lands should not be sold, or that any and all bids should be rejected. 138/

By law all patents or other evidences of title issued under the Act contain a reservation to the United States of all mineral deposits. 139/ While other reservations and reasonable restrictions as are in the public interest may be imposed, Department of the Interior regulations specify that they will keep to the minimum necessary to carry out the requirements of the law. 140/ In no case may restrictions be imposed to insure proper development of the lands after they have passed from federal ownership. 141/

D. Recreation and Public Purposes Act^{142/}

The Recreation and Public Purposes Act of 1926 authorizes the Secretary of the Interior, upon application, to sell ^{143/}or lease for recreational and public purposes any public lands, except lands withdrawn or reserved for national forests, parks, monuments, and wild life refuges and lands set aside or held for use by or for the benefit of Indians.^{144/} Lands which have withdrawn in aid of a function of a Federal department or agency other than the Department of the Interior or of a state, territory or local government unit may not be disposed of without the consent of the body having jurisdiction over them.^{145/}

Neither the original Act of June 14, 1926, 44 Stat. 741, which provided for the disposal of land for recreation purposes only, nor the Act of June 4, 1954, 68 Stat. 173, which provides, in addition, for the disposal of land for public purposes, specified the uses authorized. The Bureau of Land Management Manual lists permissible uses as follows: recreational uses; uses authorized by the Small Tract Act of 1938; ^{146/}any other uses which the legislative history of the Act shows were meant to be included; and all other uses except those which are "authorized under any other law." ^{147/}

The legislative history of the Act indicates that recreational and general public purposes were meant to be interpreted broadly; both the original Act and the 1954 amendment were designed to stem increasing demands on Congress by individual communities for special legislation authorizing the disposal of public land for specific recreational and public purposes. ^{148/} The Memorandum of May 29, 1950 from the Director, Bureau of Land Management to the Assistant Secretary of the Interior commenting on the amendments the Department had suggested in its report of April 14, 1950 on H. R. 2821, together with subsequent bills led to the 1954 Amendment, as follows:

A large number of requests are received and bills introduced for the transfer of land to governmental agencies for valuable public purposes other than recreation use. These include, for example, fish and wild life refuges, university purposes, agricultural experiment stations, public housing development, public building sites, public land, historical and monument sites, and many others. All of these now have to be handled by special legislation, or sometimes under laws having no real applicability, and which are not designed to accommodate such transfers. H. R. 2821 would, on the other hand, enable us to set up a relatively simple and direct procedure for handling such requests.

The uses specified in the above memorandum are specifically recognized by the Bureau of Land Management as appropriate public uses. 149/

Lands are to be classified in accordance with the general criteria set forth in Department of the Interior regulations. Lands chiefly valuable for recreation and public uses in federal ownership with the Bureau of Land Management's management may be classified for retention for multiple use management. Lands chiefly valuable for these uses in Federal ownership with non-federal management may be classified for lease, for periods up to twenty years with a right of renewal. Lands chiefly valuable for these uses in non-federal ownership may be classified for sale under the Act or under the Public Land Sale Act of 1964. 150/ Such lands will ordinarily be classified for sale under the Act if the proposed use involves nonprofit activities or if it is determined by the authorized officer that the provisions of the Act are required to insure the continued dedication of the land to such uses or to otherwise carry out the purposes of the Act. 151/ Lands which are classified as appropriate for sale may be leased for periods of from more than five to twenty years, if the applicant can show that he has reasonably firm plans for an early utilization of the lands and for obtaining the purchase price within a reasonable period or for periods not exceeding five years, if the applicant desires a short-term lease or if he can reasonably be expected to obtain the purchase price within such a period. 152/

1. General Provisions Governing Disposal

Eligible applicants include any state, territory, county, municipality or other state, territorial or federal instrumentality or political subdivision in which the lands are situated; any municipal corporation within convenient access to the land and within the same state or territory as the land; and any nonprofit corporation or association for purposes for which they are authorized by their creating authority to hold land. 153/ Neither government agencies nor nonprofit corporations and associations are disqualified from applying for land under the Act by charging for services performed an amount over and above the cost of the services so long as the funds are placed in a public treasury or used for public purposes or, when a private or semipublic recreation use is sponsored by a nonprofit corporation or association, placed to the account of the nonprofit organization. 154/

The Act imposes a limit upon the total acreage which a given applicant may acquire each year. A state in its own name or the name of any agency having jurisdiction over the state park system may acquire annually for recreation purposes not more than 6,400 acres involving not more than three sites, plus whatever acreage in sites of not over ten acres is required to provide small roadside parks and rest areas. Additionally, any state may acquire in its own name or that of any agency or instrumentality of the state not more than 640 acres annually for each of its programs involving public purposes other than recreation. Any political subdivision of a state and any non-profit organization may acquire in its own name not more than 640 acres annually for public purposes other than recreation.^{155/} When a proposed use includes both a recreation and another public use, the acreage is chargeable against the recreation limitation.^{156/}

An applicant under the Act must show that the land is to be used for an established or definitely proposed^{157/} project. The applicant's showing with respect to the proposed development and improvement must be sufficient to describe the project and its purpose adequately and to permit the appropriate classification and disposition of the land. At a minimum, the plan of development and improvement must include: the type and general location of all proposed improvements, including roads and trails; an estimated timetable for the actual construction of improvements; and sufficient detail to enable estimates of costs of improvements, with statement of costs if a lease with option to purchase is involved.^{158/} No land will be disposed of under the Act until first determined to be suitable for the purpose sought and not more valuable or suitable for some other use.^{159/}

a. Rental and Sales Price. Except where lands are conveyed to a state, county, or other state or federal instrumentality or political subdivision for historic monument purposes, in which case conveyance is made without charge, land classified for disposal under the Act must be appraised by the Bureau of Land Management's Classification Officer for its fair market value. In determining the fair market value of the land, the classification officer is to take into consideration the purpose for which the land is to be used: all the terms and conditions of the proposed transfer will be considered except the fact that the conveyance is subject to limitations in use and ownership, which will be reflected in the various deductions provided for.^{160/} Separate appraisal, using standard Bureau of Land Management appraisal procedures, is to be made of the timber located on the land.^{161/}

Rental charges for property leased under the Act are to be based on the fair market value of the property, including merchantable timber, but excluding mineral rights, less ten percent if the use is limited to a particular group and fifty percent if use is to be made by the general public. In no case may rent be fixed at less than 25 cents/acre or \$10.00/lease.^{162/} Advance payment of the rental for the full term is required unless the term exceeds five years, in which case advance rental may be paid in five-year periods, or the amount of the annual rental is large in comparison to the finances of the applicant, in which case advance rentals may be paid in as little as one-year periods.^{163/}

The sales price for property to be patented under the Act is to be determined as follows: the fair market value of the land less ten percent plus the fair market value of any merchantable timber is assessed^{164/} if the use is limited to a particular group and fifty percent if use is to be made by the general public. In no case may the sales price be fixed at less than \$2.50/acre or \$50.00/transaction.^{165/} The full purchase price must be paid before the patent will be issued.^{166/}

b. Terms and Conditions of Transfer. In addition to classifying and appraising the land, the Bureau of Land Management's classification officer is directed to report to the officer adjudicating the application any items that should be reserved to the United States or others and any special terms or conditions that should be included in the lease or patent.^{167/} His report will include those terms and conditions recommended by agencies other than the Bureau of Land Management whose consent is necessary for the disposal of land under their jurisdiction.^{168/}

All leases and patents are to reserve mineral rights to the United States.^{169/}

Leases and patents authorizing the use of lands for the erection or maintenance of advertising displays on public lands adjacent to highways are issued only in conformity with national and/or state standards or policies.^{170/}

Additionally, leases are to contain such terms and conditions as the administering agency considers necessary for the proper development of the land, the protection of federal property, and the protection of the public interest. Leases are terminable upon failure of the lessee to comply with the terms of the lease, upon a finding that all or part of the land is being devoted to other than the use authorized by the

lease, or upon a finding that the land has not been used by the lessee for the purpose specified in the lease for any consecutive period specified by the authorized official, but not more than five nor less than two years. Leases are not transferrable except with the consent of the authorized official.171/

The lessee may apply to the Bureau of Land Management for a change in use or a change of lessee. Unless the proposed lessee is merely a legal successor of the existing lessee, applications for a change of lessee will be processed in the same manner as the original application to lease.172/ Similarly, application by an existing lessee for a change in use will be processed in the manner prescribed for applications to lease to the extent necessary to determine whether the change in use should be allowed and whether the rental should be modified.173/

All patents issued under the Act provide that title shall revert to the United States if an attempt is made to transfer title or control over the lands to another or if the lands are devoted to a use other than that for which they were conveyed without consent of competent authority. If such consent is obtained, reverter provisions or other limitations on transfer or use cease after a period of twenty-five years to be effective. Lands patented under the Act also revert if discrimination on the basis of race, creed, color or national origin is practiced against those using or entering the patented land.174/ Again, the patentee may apply for a transfer of patentee or for a change in use. The application is to be processed in much the same manner as prescribed for original applications, except that acreage limitations do not apply to applications involving only a change in use and a call for payment will be made only if the land classification officer reappraises the land at a higher value.175/

The classification officer is directed to schedule investigations at no greater than five-year intervals in order to determine whether the lessee or patentee has complied with the terms and conditions of the conveyance.176/ After the classification officer has investigated and confirmed any reported violations, the adjudication officer is to initiate contest proceedings in the case of a patentee; if the Government prevails in the proceeding, the patent will be cancelled and title will revert to the United States.177/ In the case of a lessee, the adjudication officer is to hold the lease for cancellation; no provision is made for contest proceedings.178/

2. Disposals Under Special Pricing Programs

Special pricing arrangements have been approved by the Secretary of the Interior for disposals to states, their subdivisions and instrumentalities, and nonprofit corporations and associations^{179/} for the following specified uses, involved in programs for which the Federal Government gives other incentive assistance, such as grants and loans: public parks and other public recreation uses (any type of public outdoor recreation project including Federal aid in wildlife restoration projects supported by the Fish and Wildlife Service and "wildland" fire protection),^{180/} public health uses (hospitals, clinics, nursing homes, rehabilitation facilities, and special services);^{181/} public education uses (schools, research institutions, public libraries);^{182/} and penal and correction institutions.^{183/}

The special pricing programs are intended to provide land for such uses under "an approach which includes careful classification, appropriate tenure arrangements, and detailed terms and conditions to assure continued use for the purpose for which the lands are classified and continuity in the tenure arrangement."^{184/} Accordingly, after lands have been determined to have public recreation, public health, or public education values the Bureau of Land Management is responsible for determining the proper land tenure arrangements for the site in question.^{185/}

Possible land tenure arrangements for recreation uses include: cooperative arrangements for Federal-state or Federal-local government management of an area of public lands, utilizing leases, patents, easements, or permits covering parts of the land to give nonfederal participating parties long term tenure assurance when substantial acreage is involved, substantial multiple use values exist, or recreational attributes of more than ordinary significance exist; transfer of an entire area to a state or local government under lease, with or without option to purchase, where the law does not permit other types of transfer or in a transitional situation when the appropriate ultimate development and disposition of the lands in question is uncertain; and transfer of an entire area to a state or local government by patent, the preferred arrangement when cooperative programs are not appropriate.^{186/}

Possible land tenure arrangements for public education and public health uses include: transfer by patent when there is convincing evidence that construction of the major facility in the approved program will begin within 18 months after the issuance of a patent; transfer by lease of additional needed areas on which construction will be undertaken within ten years; and continued management by the Bureau of Land Management of a buffer zone surrounding the lands conveyed, as well as adjacent lands for which long-range needs may exist.^{187/}

In order to qualify under these special pricing programs, potential conveyees must obligate themselves to the following commitments, to be incorporated by reference or otherwise in the lease or patent:

- (a) Nondiscrimination as to the entrance or use of the land and facilities based on race, creed, color, or national origin.
- (b) Adoption of an approved program of utilization to develop and manage the land consistent with state or local comprehensive plans, zoning restrictions, building codes, and other similar limitations. The program must contain in sufficient detail to permit effective enforcement statements of need, purpose, and objectives, a plan of development and operation, and a time schedule for completion of the project.
- (c) Recognition of the responsibility of the Bureau of Land Management to manage, consistent with the objectives of the basic use, all other values of the lands and the right of the United States to retain the revenues from such management. Ordinarily, this reservation will be included only when substantial values such as merchantable timber and high value grazing are involved.
- (d) To charge no more than is reasonable for the use of facilities on the land (whether by concession or otherwise) and to charge no more for entrance to and the use of the area than is charged at other comparable installations managed by state and local agencies.188/

States, their subdivisions and instrumentalities that accept such commitments are to pay \$2.50 per acre with a minimum payment of \$50.00 per transaction for properties to be patented and 25 cents per acre per year with a minimum payment of \$10.00 per lease for properties to be leased. Land will be conveyed without monetary consideration for historic monument purposes.189/

Payment to be made by nonprofit associations and nonprofit corporations that accept these commitments is established as follows. The sale price of properties to be patented will be fixed at the fair market value of any merchantable timber plus the fair market value of the property exclusive of merchantable timber and mineral rights less the allowance for public benefits,190/ but not less than \$2.50 per acre nor \$50.00 per transaction

Land will be conveyed without monetary consideration for historic monument purposes. Rental for properties to be leased is to be based on the fair market value of the land, less the allowance for public benefits, 191/ but not less than 25 cents per acre nor \$10.00 per lease. 192/

E. Federal Property and Administrative Services Act of
1949 193/

The Federal Property and Administrative Services Act of 1949 prescribes a system whereby the Federal Government attempts to achieve the economical and efficient utilization and disposal of its real and related personal property under the direction of a single authority, the GSA. 194/

The property subject to disposal under the Act includes any interest in property under the control of any Federal agency except: the public domain, lands reserved or dedicated for National forest or National park purposes; minerals in lands or portions of lands withdrawn or reserved from the public domain which the Secretary of the Interior determines are suitable for disposition under the public land mining and mineral leasing laws; and lands withdrawn or reserved from the public domain unless the Secretary of the Interior, with the concurrence of the Administrator of the GSA, determines that such lands are not suitable for return to the public domain for disposition under the general public land laws because they are substantially changed in character by improvements or otherwise. 195/

Executive agencies 196/ are expected insofar as practicable to transfer excess real property -- property which an agency head determines is no longer required for the needs of the agency, 197/ -- to other Federal agencies 198/ and approved organizations and to fulfill their requirements for real property by obtaining excess property from other agencies. 199/

Executive agencies are enjoined, after ascertaining that their needs for real property could not be filled by an intra-agency transfer of property which they already control or by the termination of an outstanding lease or permit on property which they already control, to report any such need for real property to the GSA, describing the property required in sufficient detail to enable GSA to review its inventory of excess property and determine whether property suitable for the needs of the agency is available. 200/

Such agencies are also directed to survey continuously the real property under their control and to report property which they determine to be in excess to the GSA. 201/ When an agency determines that lands which have been withdrawn or reserved from the public domain are excess, it must file a notice of intention to relinquish such property with both the

Department of the Interior (Bureau of Land Management) and the GSA.202/ The Bureau of Land Management requires that such notice contain, inter alia, the relinquishing agency's recommendations as to the future disposition of the lands and any terms and conditions which should be incorporated in such disposition to protect the public interest.203/ If the Bureau of Land Management determines that the lands sought to be relinquished are suitable for return to the public domain for disposition under the general public land laws, the Department of the Interior formally accepts them for such purposes.204/ If the Bureau of Land Management determines that such lands are not suitable for return to the public domain because they are substantially changed in character by improvements or otherwise, it will seek the GSA's concurrence and, upon receiving it will notify the agency to report the land to GSA as excess property.205/

GSA is directed to screen the excess property reported to it by executive agencies and to notify all those Federal agencies which may reasonably be expected to have a need for it of its availability. The agency then has thirty days within which to advise GSA of a tentative and an additional thirty days within which to advise GSA of a firm requirement for the property.206/ After screening excess property for utilization by other Federal agencies, GSA may determine that the property is not required for the needs and discharge of the responsibilities of all Federal agencies and may classify it as surplus property.207/

Surplus property is to be disposed of 208/ by the authorized disposal agency according to its estimated highest and best use.209/ In the case of real estate interests held by the Government in nongovernment owned property and in the case of fixtures, structures, and improvements to be disposed of without the underlying land, the authorized disposal agency is the holding agency.210/ In all other cases, the authorized disposal agency is the Administrator of GSA or his delegatee.211/ The Administrator has general authorization to delegate and authorize redelegation of his authority to any official in the GSA or to the head of any other Federal agency.212/ Additionally, the Administrator is authorized, in his discretion, to assign surplus real property to the Secretary of HEW for disposal which the Secretary recommends is needed for education or public health purposes.213/

Pending the ultimate disposition of excess or surplus property, the holding agency, with the approval of the disposal agency, may grant a lease or permit for the nonfederal interim use of the property provided, in the case of excess property, that such interim use is not required for the needs of any Federal agency, or provided, in the case of surplus property, that the use and occupancy would not interfere with or retard the disposal of the property.214/

1. Disposals of Excess Property

Excess property may be disposed of among Federal agencies and to approved organizations, which include mixed-ownership Government corporations, the municipal Government of the District of Columbia and any requisitioning nonfederal agency when the function of a Federal agency authorized to procure for it has been transferred to the GSA.215/

The agency or approved organization requesting the transfer of excess property must submit a formal request with GSA. Upon the determination by GSA, with the concurrence of the Bureau of the Budget in the case of a transfer involving property with a fair market value of \$100,000.00 or more, that a transfer is in the best interests of the Government and that the requesting agency is the appropriate agency to hold the property, the transfer may be made.216/

The Act provides that the Administrator of GSA shall prescribe the extent of reimbursement for transfers of excess property with the approval of the Director of the Bureau of the Budget.217/ Pursuant to an agreement between the Director and the Administrator, GSA regulations provide for reimbursement as follows.218/

In most cases, reimbursement will be equal to half of the appraised fair market value of the property transferred or, where the transfer is for the purpose of replacing property of the transferee with more desirable property, half the difference between the value of the property to be replaced and the fair market value of the property replacing it.219/

Transfer may be made without reimbursement where the transfer agency clearly cannot furnish it without obtaining an additional appropriation of funds for such purpose from Congress or without diverting funds for that purpose which Congress approved for some other program;220/ where Congress specifically authorized the transfer without reimbursement or believed transfer would occur without it when it funded the transferee's program;221/ or where land within the boundaries of a National forest which is available and suitable for National forest use is transferred to the Department of Agriculture.222/

Reimbursement equal to the appraised fair market value is required: where the transferee agency has requested the net proceeds of the transfer pursuant to 40 U.S.C. S 485(c) (1964) -- i.e., where the property transferred was acquired by the use of funds either not appropriated from the general fund of the Treasury or appropriated therefrom but by law reimbursable from other receipts; where either party to the transfer is subject to the Government Corporation Control Act223/ or where

either party to the transfer is a mixed-ownership Government Corporation the District of Columbia, or an eligible requisitioning agency.224/

GSA will execute or authorize all approved transfers to the requesting agency.225/ Apart from GSA's general authority to prescribe policies and methods and to make regulations governing the transfer of property among Federal agencies and approved organizations, neither the Act nor the regulations implementing it specify conditions to be imposed on the transfer.226/

2. Surplus Property

a. Disposals to "Eligible Public Agencies". Special provisions govern disposals to those public agencies which are eligible to procure surplus property for public uses under the Act and under other surplus property disposal programs which have been continued in effect under the Act.

Whenever property is determined to be surplus, the disposal agency is directed227/ to list the public agencies eligible to procure property under the statutes set out in 41 C.F.R. § 101-47.4905 as follows:

- (a) 50 U.S.C.A. App. § 1622(h) (Supp. 1969) authorizing disposals to any state, political subdivision and instrumentalities thereof, or municipality for public parks, public recreation areas, or historic monuments;
- (b) 40 U.S.C. § 484(k) (1) (A) (1964) authorizing disposals to states and other political subdivisions and instrumentalities and tax-supported educational institutions for school classroom and other educational purposes;
- (c) 40 U.S.C. § 484 (k) (1) (B) (1964) authorizing disposal to states and other political subdivisions and instrumentalities and tax-supported medical institutions for public health purposes, including research;
- (d) 50 U.S.C.A. App. § 1622(g) (Supp. 1968) authorizing disposals to any state, political subdivision thereof, municipality, or tax-supported institutions for public airport purposes;

- (e) 40 U.S.C. § 484(e) (3) (H) (1964) authorizing negotiated disposals to any state or political subdivision and agencies or instrumentalities thereof when the estimated fair market value of the property and other satisfactory terms of disposal are obtained by negotiation;
- (f) 16 U.S.C. §§ 667(b)-(d) (1964) authorizing disposals to the agency of the state administering the wildlife resources of the state for wildlife conservation purposes;
- (g) 23 U.S.C. §§ 107 and 317 (1964) authorizing disposals for Federalaid and other highways to the state where the property is situated, or to such political subdivision of the state as its law may provide;
- (h) 40 U.S.C. § 345(c) (1964) authorizing disposals to any state or political subdivision thereof for the widening of public highways, streets, or alleys;
- (i) 50 U.S.C. App. § 1622(d) (Supp. 1968) authorizing disposals to any state or political subdivision and agencies or instrumentalities thereof for power transmission lines.

Prior to any public advertising, negotiation, or other disposal action, the disposal agency must give notice to such eligible public agencies that the property has been determined to be surplus. The agency then has twenty days within which to inform GSA of its desire to develop and submit a comprehensive and coordinated plan for the use and procurement of the property.^{228/} The agency must inform GSA of the contemplated use of the property, the statute or statutes under which the agency desires to procure the property, the nature of the interest desired if less than a fee title to the property is contemplated, and the estimated length of time required to develop a plan for the use and procurement of the property.^{229/}

The disposal agency must allow a reasonable time for the agency to develop and submit a plan of use and procurement.^{230/} The plan of use submitted will be the basis for the subsequent determination by GSA as to whether the property is available for the proposed use and whether the disposal is authorized under the statute specified.^{231/} The plan submitted is to be considered and acted upon in accordance with the provisions of the applicable statute and regulations.^{232/}

b. Disposals to Others. Besides making surplus property available to eligible public agencies under the statutes described

above, the disposal agency is directed to widely publicize surplus property which becomes available, giving information adequate to inform interested persons^{233/} of the general nature of the property and its possible uses, as well as any reservations, restrictions, and conditions imposed upon its disposal.^{234/} Upon request, the disposal agency shall furnish all bona fide potential purchasers and lessees with such preliminary information and shall prepare and furnish to all prospective purchasers or lessees written invitations to make an offer, which shall contain or incorporate by reference all the terms and conditions under which the property is offered for disposal.^{235/}

Surplus property which is not disposed of to eligible public agencies, in the manner and on the terms specified in the statutes authorizing such disposal, may be disposed of by negotiation or after public advertising for bids.^{236/}

Disposal by negotiation is authorized when: the estimated fair market value of the property does not exceed \$1,000.00; when bid prices after advertising are not reasonable; when the character or conditions of the property or unusual circumstances make it impractical to advertise publicly for competitive bids and the fair market value of ^{237/} the property and other satisfactory terms of disposal can be obtained by negotiation; when the disposal will be to states, political subdivisions thereof or tax-supported agencies therein and the estimated fair market value of the property and other satisfactory terms of disposal are obtained by negotiation.^{238/}

In all other cases, disposal must be made after publicly advertising for bids.^{239/} The advertising for bids is to be made in such a way as will permit full and free competition, consistent with the value and nature of the property involved. The advertisement must designate the place to which the bids are to be delivered and the place, date, and time of the public offering. All bids must be publicly disclosed at the time and place stated in the advertisement. Award will be made to the responsible bidder whose bid, conforming to the invitation for bids, is most advantageous to the Government, price and other factors considered. However, all bids may be rejected when it is in the public interest to do so.^{240/}

When a bid commensurate with the fair market value of the property is not received, the highest bidder may be given an opportunity to increase his offered price.^{241/} Whether such action is taken or whether all bids are rejected and the property reoffered for sale on a publicly advertised competitive bid basis or disposed of by negotiation is within the discretion of the head of the disposal agency or his delegatee.^{242/}

Credit sales may be made when the disposal agency determines that the sale of specific property exceeds \$2,500.00.243/ GSA regulations specify the amount of down payment and the interest charges required.244/ However, when the disposal agency determines that an offering on more liberal credit terms than those specified is necessary to obtain greater competition on the local market, alternate terms of payment may be recommended by the disposal agency with the approval of the Administrator.245/

Special provisions govern the interim disposition of surplus property by lease. Pending its ultimate disposal, a lease or permit on surplus property may be granted by the holding agency with the approval of the disposal agency provided the use and occupancy would not interfere with or retard the disposal of the property. The lease or permit is to be made revocable on not to exceed thirty days notice by the disposal agency and may not exceed one year. Such consideration and other terms and conditions as are deemed appropriate to protect the interests of the United States will be imposed.246/

Special provisions also govern the sale of surplus military chapels. Surplus military chapels are to be segregated from other buildings and disposed of separate and apart from the land, except when the chapel is located on surplus Government owned land and the disposal agency determines that it may properly be used in place, in which case a suitable area of land may be set aside for such purposes and sold with the chapel. Applications for the purchase of surplus chapels for use off-site or in-place are solicited by public advertising and reviewed by the Chief of Chaplains of the service which had jurisdiction over the property. The chapel is to be sold at a price equal to its appraised fair market value in the light of conditions imposed relating to its future use and the estimated cost of removal, where required. The land shall be sold at a price equal to the appraised fair market value of the land based on the highest and best use of the land at the time of disposal. Chapels are sold subject to the condition that during its useful life, the chapel shall be maintained and used as a shrine, memorial, or for religious purposes. If the transfer fails to maintain and use the chapel conveyed for such purposes, there shall become due and payable the difference between the appraised fair market value of the chapel, as of the date of transfer, without restrictions in its use and the price actually paid. Where the land on which the chapel is located is sold with the chapel, no conditions or restrictions on the use of the land are imposed.247/

The GSA Administrator or his delegatee is authorized to determine all terms and conditions of the transfer of surplus property.^{248/} The Act itself delegates authority to the Secretary of HEW in the case of property transferred to public agencies for educational or public health purposes, to the Secretary of the Interior in the case of property transferred to public agencies for public park, public recreation and historic monument purposes, to the Secretary of Defense in the case of property transferred to public agencies for use in the training and maintenance of civilian components of the armed forces, and to the Federal Civil Defense Administrator in the case of property transferred to civil defense organizations to determine and enforce the terms and conditions of transfer.^{249/} In these cases, the agencies' action is subject to prior disapproval by the Administrator.^{250/} Power to dispose of real property of nominal value and other minor interests in land have been delegated to the agencies.^{251/}

Specific terms and conditions may be required by the various statutes listed in 41 C. F. R. § 101-47.4905 authorizing transfer to eligible public agencies for public uses when disposal is made pursuant to these statutes.^{252/} GSA regulations themselves merely provide that when property is offered for disposal under a land sale contract or lease, the purchaser or lessee shall be required to pay all taxes or similar charges which may be imposed on the property and that when property is offered for sale on credit or for lease, the purchaser or lessee must procure and maintain such insurance as may be required by the Government.^{253/}

Real property shall be conveyed by quitclaim deed or deed without warranty unless the disposal agency finds another form of conveyance necessary to obtain a reasonable price for the property or to render the title marketable.^{254/} When a sale is made on credit, the purchaser must agree not to lease or resell the property prior to payment in full without obtaining prior Government approval.^{255/}

3. Disposals for Education and Public Health Purposes

The Administrator of GSA is authorized, in his discretion and under such regulations as he may prescribe, to assign to the Secretary of HEW surplus property to be sold or leased to states, their political subdivisions and instrumentalities and to tax-supported and other non-profit educational or medical institutions for educational or public health uses.^{256/}

When excess property is screened for the needs of Federal agencies, notice of the availability of such property for the information of the Secretary of HEW shall be sent to the office designated by the Secretary

to serve the area in which the property is located. With the prior consent of GSA and on a case by case basis, the Department of HEW may at this point initiate screening for potential education or public health applicants or with such consent may develop a known potential education or public health need.257/

When the property has been determined surplus and available for education or public health uses, the disposal agency must notify the Secretary of HEW as of the date such determination becomes effective.258/ Prior to taking any other disposal action, the disposal agency must give notice of the availability of such property to public agencies eligible to procure surplus property under the statutes listed in 41 C.F.R. § 101-47.4905, which include 40 U.S.C. § 484(k)(1)(A), (B), and must allow an interested agency a reasonable time in which to develop a plan for the use and procurement of the property. Such notice shall state that any planning for an education or public health use must be coordinated with the Department of HEW. The proper regional office of the Department of HEW must be informed in advance of the notice given to public agencies in order to permit similar notice to be given simultaneously by the Department to eligible public agencies, the Department may proceed with its screening functions for potential education or public health applicants.259/

Whenever the disposal agency has not been notified by a public agency of its desire to develop a plan of use within twenty days after notice of the availability of surplus property has been furnished to it, but has been notified by the Department of HEW of a potential education or public health requirement within the twenty day period, the Department must submit to the disposal agency, within 25 days after the expiration of the twenty days period, its recommendation as to whether or not the property should be assigned to the Secretary of HEW for disposal.260/

Whenever an eligible public agency has submitted a plan of use and procurement for an education or public health requirement, the disposal agency shall forward copies to the Department of HEW. The Department shall then submit to the disposal agency, within 25 days after receiving the plan, a recommendation as to whether or not the property should be assigned to the Secretary for disposal.261/

In the absence of a recommendation that the property be assigned to the Secretary, the disposal agency shall proceed with other appropriate disposal action.262/

If a recommendation that property be assigned to the Secretary is approved, the property shall be so assigned. The Department of HEW shall take all steps necessary to accomplish the transfer within sixty days after the property has been assigned to it.263/

The Secretary of HEW is authorized to fix the sale or lease value of the property to be disposed of, taking into consideration any benefit which has accrued or may accrue to the United States for the use of such property by the public agency.264/ The Secretary is also authorized to determine and enforce all terms and conditions of transfer, subject to the prior disapproval of the Administrator.265/

F. Disposals of Isolated and Mountainous Tracts 266/

Revised Statute 2455, as amended, authorizes the Secretary of the Interior to initiate the sale of any isolated or disconnected tract or parcel^{267/} of the public domain and to entertain applications for the sale of nonisolated public lands, the greater part of which is mountainous or too rough for cultivation.268/

1. Criteria Applied in Making Lands Available

Complete discretion is lodged with the Secretary of the Interior as to whether and when to offer lands for sale under the Act.269/ However, current Department of the Interior regulations state that the policy of the Secretary in administering the Act is to take into consideration the criteria set forth in the regulations to the Classification and Multiple Use Act of 1964 and to make available on an orderly basis lands subject to the Act which are more valuable or proper for nonfederal ownership.270/

The criteria established by the Bureau of Land Management in 1958 indicating when lands would be sold under the Act would appear to be consistent with the aims of the Classification and Multiple Use Act and thus still relevant. These indicate that lands will be made available under the Act when:

- (1) Public land patterns are so discontinuous and disconnected or public land ownership is so limited that continued Federal ownership is not economic and has no real effect on other Federal programs within the area involved;

- (2) Public lands are not a part of, or are a part of but not essential to, the maintenance of Bureau resource management programs already in effect or included in existing plans;
- (3) Because of lack of access, costs of administration, or susceptibility to trespass, the Federal management of the lands is impracticable in the reasonable future;
- (4) The disposal of the lands will not unduly interfere with the use, diminish the value, or prevent the disposal of other public lands;
- (5) Private ownership will result in equal or better management of the lands;
- (6) Disposal of the land will not disturb the basic stability of the local land use economy or dependent industries; and
- (7) Disposal would be consistent with stated departmental and Bureau policies such as those governing recreational lands, particularly when access to Federal lands under retention is affected. 271/

Additionally, conformity to the criteria set forth in the Classification and Multiple Use Act of 1964 requires that the lands not be more suitable for disposal under some other law and that such disposals be consistent with the plans or, in their absence, with the views of local government authorities if the lands are needed for urban or suburban purposes or are chiefly valuable for residential, commercial, agricultural, or industrial purposes. 272/

Lands which are mineral in character, defined as lands where the mineral is ordinarily in sufficient quantity to add to their richness and to justify expenditures for its extraction, will not be sold under the Act. 273/ And, in mineralized areas, reasonable diligence will be used to avoid offering lands covered by mining claims. 274/ This policy presumably reflects the fact that patents issued under the Act do not reserve mineral interests to the United States.

2. Provisions Governing Disposal

Lands are available under the Act to individuals, partnerships, associations, and corporations. 275/

The maximum size isolated tract that may be offered for sale is 1,520 acres, and the maximum size mountainous tract that may be offered for sale is 760 acres.276/ The Bureau of Land Management indicates a willingness under certain circumstances, such as when there is a high degree of variability between different portions of a tract, to subdivide isolated tracts into separate parcels and offer them for sale simultaneously, with every effort being made to combine them into logical units of sale to prevent a residue of low-value parcels remaining in Government ownership.277/

Lands are to be sold at public auction, after due notice of sale has been given specifying the time and place for submitting bids.278/ The highest bidder is declared, and the owner of contiguous lands279/ is accorded a preference right, for a period of not less than thirty days after the highest bid has been declared, to buy the offered lands at the highest bid price, not to exceed three times the appraised price. Where two or more persons apply to exercise this preference right, the Secretary of the Interior may make an equitable division of the land among the applicants, taking into consideration such factors as: the equalizing of the number of acres between the applicants; desirable land use, based on topography, land pattern, location of water, proper development of the land, and similar factors; legitimate historical use, including construction and maintenance of ownership of adjacent lands. If considerations dictate, all of the lands may be awarded to one of the applicants.280/

If there are no qualified preference applicants at the close of the thirty day period, a final certificate will be issued to the highest bidder. Until then, it may be determined at any time that the lands should not be sold or that all bids should be rejected. Sales will not be consummated when, for example, circumstances reveal that the highest bid otherwise acceptable is less than the fair market value of the land as of the date of sale; an appropriate public requirement for the lands is identified subsequent to the public notice281/ or collusive or other activities have restrained free and open bidding.282/

While the Act itself is silent on the point, the Bureau of Land Management Manual provides that when a tract is otherwise suitable and could be classified for public sale but certain rights are needed by the United States or others, e.g., when land is sold with improvements which are not owned by the Government, the land may be sold with appropriate reservations in the patent.283/ In such cases, the effect on the value of the tract caused by the reservations must be considered in determining the appraised price.284/

G. Disposals of Reclamation Lands 285/

The Reclamation Act of 1902 broadly authorizes the Secretary of the Interior to withdraw lands for the purpose of making surveys and irrigation investigations in order to determine the feasibility of the reclamation plans proposed. Only a portion of the lands will in fact be irrigated even if the project is feasible, and it is impossible to decide in advance what lands may be watered, how much water will be available, and whether the cost will justify the undertaking.286/ However, such lands cannot be settled, entered or located in any manner so long as they remain withdrawn.287/ Further, since passage of the Act of June 25, 1910, lands withdrawn as susceptible of irrigation will be opened to settlement only when approved farm unit plats have been filed and water is ready to be delivered to the land.288/ Accordingly, the Secretary of the Interior has been given authority under four separate Acts to dispose of lands no longer suitable or necessary for reclamation purposes and costly and inefficient to manage if retained.

The Act of February 2, 1911 authorizes the Secretary of the Interior to have appraised and to sell any lands which have been acquired under the Reclamation Act of 1902 for any irrigation works contemplated by the reclamation law and not needed for the purposes for which they were acquired.289/

The Act of May 20, 1920 authorizes the Secretary of the Interior to sell any public lands, not otherwise reserved, which have been withdrawn in connection with a Federal irrigation project and improved at the expense of the reclamation fund for administrative or other like purposes and which are no longer needed for project purposes.290/

The Act of May 16, 1930 authorizes the Secretary of the Interior in connection with Federal irrigation projects to dispose of vacant public lands designated as temporarily or permanently unproductive and to dispose of tracts within such projects which by reason of the inclusion of lands designated or temporarily or permanently unproductive are found by the Secretary to be of insufficient size to support a family and to pay water charges.291/

The Act of March 31, 1950 authorizes the Secretary of the Interior in connection with any Federal irrigation project for which water is available to dispose of any tract of withdrawn public land which, in the opinion of the Secretary, has less than sufficient acreage reasonably required to support a family and is too small to be opened to homestead entry and classed as a farm unit under the Reclamation Act.292/

The Secretary's authority under these Acts is delegated to the Commissioner of Reclamation.293/ Prior to any disposal under the Acts, the Commissioner must determine that it would be in the best interests of the irrigation project in which the lands are located and that a sufficient water supply exists for the lands if they are to be irrigated.294/

1. Disposals Under the 1911 and 1920 Acts

Lands are available under the Act to any individual giving proof of citizenship.295/ Under the Acts of 1911 and 1920, lands are to be sold to the highest bidder at public auction, after due notice of sale has been given. Additionally, under the Act of 1920, lands which are valued at less than \$300.00 may be sold at public or private sale, and no public notice of sale need be given. Lands may not be sold under either Act for less than their appraised value. Improved lands sold under the Act of 1920 may be purchased in five annual installments: no such provision is made for the sale of lands under the Act of 1911.296/

The maximum acreage any one person may buy under either Act is 160 acres.297/

The Secretary is authorized under both Acts to convey the entire interest of the United States in such lands or to make such conveyances subject to whatever reservations, limitations, or conditions he deems proper. The Act of 1920 also specifically provides that irrigable lands sold under its provisions shall pass title subject to all reclamation laws applicable to lands of that character.298/

2. Disposals Under the 1930 and 1950 Acts

Under the Acts of 1930 and 1950, lands are to be sold to the highest bidder at public auction, after due notice of sale has been given, or at private sale. In either case, lands may not be sold for less than their appraised value.299/ Lands may be sold either for cash or upon deferred payments.300/

Lands sold under these Acts may be purchased only by resident farm owners or resident entrymen actually living on the project within which the land is located.301/ Under the Act of 1950, a farm owner or entryman may purchase no more land than would bring his total land ownership within the project to 160 acres.302/ Under the Act of 1930, a purchaser may buy no more land than would bring his total holdings within the project to 320 acres.303/

Under both Acts, the patents issued will contain reservations to the United States for a lien for water charges where appropriate, reservations of coal and other mineral rights to the same extent as patents issued under the homestead laws, and such other reservations as are required by law.304/ Additionally, unproductive lands sold under the Act of 1930 are conveyed subject to a possible denial of water rights from the irrigations project of which they formerly were a part.305/

III. STATUTES AUTHORIZING THE USE AND OCCUPANCY OF SECTION 10 LANDS - OVERVIEW

The material which follows is that which applies whenever the interest specified is granted by the agency specified, regardless of use, under the authority of the statutes specified. The agencies included are the principal land management agencies: the Bureau of Land Management (hereinafter referred to as BLM), the Forest Service, and the Bureau of Reclamation. Regulations and instructions pertaining to such interests granted by other federal agencies which are of insufficient scope to be treated herein are included, where relevant, in the use chapters. The statutes authorizing the use and occupancy of Section 10 lands and cited in the discussion are set out in Exhibit III-2, following the footnotes to this chapter, with the prime considerations of the study detailed for each statute.

A. Lands Administered by the Bureau of Land Management

1. Rights-of-Way

General procedures and policies apply 306/ whenever a right-of-way is granted by the BLM under the authority of those statutes which authorize the Secretary of Interior to permit the use and occupancy of public lands for specified purposes. 307/ "Rights of Way" are defined to include licenses, permits or easements, as used in the authorizing statutes. 308/

Where the land over which the right of way is sought is withdrawn or reserved for the use of another Federal agency, the BLM is required to clear the application with such agency. 309/ Whenever a right of way is sought through or in national forest lands or any area withdrawn for inclusion within national forests, the applicant must enter into such stipulations and execute such a bond as the Forest Service may require for the protection of the national forests. In the case of reservation lands administered by the National Park Service, rights-of-way for any purpose, other than for those purposes for which rights-of-way may not be granted in any national park or monument without specific authority of Congress, 311/ are issued by the National Park Service upon a showing to the satisfaction of the Service that the right-of-way will not interfere with park uses or result in damage to the park. 312/

While the granting of a right of way is discretionary, the BLM states that it is the policy of the Bureau, to the extent that it is in the public interest, to grant requested rights-of-way as promptly as possible and with as few restrictions as possible, since the granting of rights-of-way is essential to the proper use and development of public and private lands. 313/ However, a later instruction memorandum states that, because of increasing demands

for rights-of-way, the planned management of rights-of-way is encouraged to avoid excessive demands on a fixed or diminishing resource base and to protect aesthetic values. The number and size of permits are to be held to a minimum, and dual or multiple-use rights-of-way maximized. 314/

a. Application

Eligible applicants include corporations, individuals and associations. Except for those applying under 43 U.S.C. § 946 et. seq., and 43 U.S.C. §§ 952-955, an individual applicant and individual members of association applicants must give evidence of citizenship. In all cases, corporations must give evidence of valid incorporation. 315/

Application is made by letter. In his application, the applicant must cite the act to be invoked and state the primary purpose for which the right-of-way is to be used. 316/ In general, the letter must be accompanied by a map showing the survey of the right-of-way, properly located with respect to the public land surveys so that the right-of-way may be accurately located on the ground. 317/ The width of all right-of-ways must be given. 318/

b. Interest and Tenure

No interest granted as a right-of-way gives the holder any estate of any kind in fee in the lands. The interest granted is to consist of an easement, license or permit in accordance with the terms of the applicable statute, but no interest greater than a revocable permit is to be granted unless the applicable statute provides otherwise. 319/

The right-of-way is to be granted for the longest period possible consistent with the statutory and regulatory authority for the permit, the expected changes in land use and value, and the period of need for the permit. 320/

In order to facilitate the use of the right-of-way applied for, the applicant may be granted an additional right-of-way for ingress and egress to the primary right-of-way, including the right to construct, operate and maintain such facilities as may be necessary to obtain ingress and egress. The applicant must present satisfactory evidence that the additional right-of-way is reasonably necessary for the use, operation, or maintenance of the primary right-of-way. 321/

The applicant may also submit a request for permission to construct right-of-way improvements in advance of a right-of-way. 322/ Requests to commence construction in advance of approval of a right-of-way are filed with the agency having supervision of the land involved. 323/ Advance permission to commence construction over lands under jurisdiction of the Department of Interior or

its agencies may be given if the delays attendant to issuance of the right-of-way would result in substantial losses or injuries or if the request results from an emergency situation. 324/ Any grant of advance permission is for the convenience of the applicant, does not commit the Department to approve the right-of-way, and is revocable at will. 325/ It is the practice of the BLM not to give permission for construction in advance of a right-of-way if there is a real possibility that the right-of-way will be denied. 326/

c. Price and Related Terms

No charge is made for the right-of-way where the use and occupancy are exclusively for irrigation projects, municipally operated projects, or non-profit or Rural Electrification Administration projects, or where the use is by a Federal agency. Additionally, no charge is made for permits granted under the authority of 43 U.S.C. §§ 934-39, 23 U.S.C. § 107 (d), 23 U.S.C. § 317, 43 U.S.C. § 932, 43 U.S.C. §§ 946-49, and 43 U.S.C. §§ 952-55. 327/ Otherwise, a charge is made equal to the fair market value of the right-of-way but not less than \$25 per five-year period for any right-of-way. In no case is the total rental received to be less than \$25. 328/

At any time, not less than five years after either the grant of the right-of-way or the last revision of charges thereunder, the charges may be reviewed and new charges imposed. 329/ BLM policy is to review the charges at approximately five year intervals, except where a permit is issued with full payment in advance. 330/

Prior to the imposition of any new charges, the right-of-way permittee must be given notice of an opportunity for a hearing. 331/

d. Conditions and Restrictions

An applicant, by accepting a right-of-way agrees to comply with the following terms and conditions:

- (1) To comply with State and Federal laws applicable to the project for which the right-of-way is approved and lands included in the right-of-way;
- (2) To clear and keep clear the lands within the right-of-way;
- (3) To take soil and resource conservation and protection measures;
- (4) To take reasonable steps to prevent and suppress fires on or near lands to be occupied under the right-of-way;

- (5) To build and repair such roads, fences, and trails as may be destroyed or injured by construction work and to build and maintain necessary and suitable crossings for all roads and trails that intersect the works constructed, maintained, or operated under the right-of-way;
- (6) To pay the U.S. full value for all damages and to indemnify the U.S. against any liability for damages arising from the occupancy or use of the lands under the right-of-way;
- (7) To pay stumpage value of timber cut, removed or destroyed;
- (8) To comply, in conformity with the regulations, to such conditions as may be found by the agency having supervision of the lands to be necessary as a condition to the approval of the right-of-way;
- (9) To restore the land to its original condition on revocation or termination of the right-of-way; and
- (10) Not to discriminate against any employee or applicant for employment because of race, creed, color or national origin, and to require an identical provision to be included in all sub-contracts. 332/

Additionally, the allowance of the right-of-way is subject to the express condition that the exercise thereof will not unduly interfere with the management, administration or disposal by the United States of the lands affected thereby and that the right-of-way will be modified, adapted, or discontinued if found by the Secretary to be necessary, without liability or expense to the United States. 333/

A period of five years from the date of the approval of the right-of-way is usually allowed for construction unless a different period is provided by statute. 334/ Proof of construction is to be submitted to the BLM upon completion of construction. 335/ Upon proof of construction, lands under the administrative jurisdiction of the BLM will be inspected when the construction operations of the permittee would involve substantial values or if there is room for question whether the permittee may have or have not constructed the right-of-way improvements stated in his proof. Lands will also be inspected on termination of the grant. When the lands are under the administration of an agency other than BLM, the agency having administrative jurisdiction is expected to make all necessary inspections. 336/

Any proposed transfer of the right-of-way granted, except those granted under 43 U.S.C. §§ 946-49 and 43 U.S.C. §§ 934-39, must be approved by the BLM. The transferee must stipulate that he agrees to be bound by the terms and conditions of the right-of-way before the transfer will be approved. 337/

Rights-of-way may be cancelled for violation of the provisions of the regulation for violation of the terms and conditions of the right-of-way, and for abandonment, nonuse, or failure to construct within the period allowed unless otherwise provided by law. 338/

2. Permits

Special land use permits are issued by the BLM under the Secretary of Interior's general authority to administer the public lands. 339/ Department of Interior regulations provide that it is the policy of the Secretary of Interior in the administration of lands under the jurisdiction of the BLM to permit the use thereof where practical for special purposes not specifically provided by existing law. 340/

Subject to the following limitations, it is the policy of the BLM to issue permits for use and occupancy whenever their issuance would lead to more effective utilization of public lands and resources without limiting the freedom of the Government to make other disposition of the land and its resources. 341/

Permits for special uses will not be issued in any case where the provisions of any law may be invoked. 342/ However, a permit may be issued for uses for which Congress has made specific statutory provision if the applicant cannot qualify under the governing statute or if the lands are not made subject to such use by the governing statute. 343/ Additionally, permits will not be issued for uses which the Congress has forbidden by specific statutory enactment, for uses or purposes which are contrary to or inconsistent with Federal, State or local laws or public policy, or where statutory authority exists which would permit a trespasser to legalize his occupancy pending the trespassers obtaining legal occupancy. 344/

With respect to withdrawn and reserved lands, an exception is made in the case of revocable permits to the BLM's general policy of retaining maximum responsibility for the management of such lands; if the agency for whose purpose the lands have been withdrawn or reserved is essentially a land-management agency (e. g., the Bureau of Reclamation, the Forest Service), it is in general to issue revocable use permits and licenses; otherwise, the BLM will do so. 345/

a. Eligible Applicants

Eligible applicants include any citizen or individual filing a declaration of intention to become a citizen, any group or association of citizens, any corporation authorized to conduct business in the state in which the land involved is situated, any agency of the Federal Government, and any state or political subdivision thereof. 346/

Upon expiration of a permit, the existing permittee will, upon filing an application for renewal, be considered a preferred applicant for a new permit provided no superior claim to the land has been asserted in the meantime. 347/

b. Interest and Tenure

Special land use permits are defined as privileges to use and occupy Government real property which are revocable at the will of the grantor. 348/ In all cases, the special land use permit is made revocable at the discretion of the authorized officer at any time, upon notice, if in his judgment the lands should be devoted to another use or the conditions of the permit have been breached. 349/ Permits are not to contain any terms which would in any way limit their revocability on the motion of the Government. Nor are they to contain any terms which would tend to create equities in the permittee which could not adequately be satisfied upon termination of the permit. 350/ For example, generally permits will not authorize the construction of permanent improvements. 351/

In his application, the applicant specifies the land desired and the period for which he desires the land, not to exceed five years. 352/ While there is no stated maximum acreage available, a permit will not be issued for a larger area than is determined to be necessary for the contemplated use. 353/ The BLM Classification Officer determines the proper term for the permit, not to exceed the term requested. 354/

c. Price and Related Terms

Where lands are desired by an individual, partnership or corporation organized for profit, rental is to be fixed at fair market value of the privilege granted. Minimum rental is fixed at not less than \$10 per payment period. Payments may be annual or otherwise, and the rental may be adjusted at the end of each payment period. 355/ The Application and Permit Form provides for the advance payment of annual rental. 356/

In appraising the fair rental value, the limitations or restrictions on use imposed by the terms and conditions of the permit and the uncertainty of tenure it provides is to be taken into consideration. 357/

Department of Interior regulations provide that no rental charges are made to agencies of the Federal Government or to agencies of states and political subdivisions thereof. 358/ However, BLM policy is to charge state agencies, political subdivisions thereof, and nonprofit corporations rental fixed at the fair market value of the privilege less specified deductions. 359/

d. Conditions and Restrictions

All permits contain conditions which provide generally that the permittee shall observe all Federal, State and local laws and regulations, shall take all reasonable precautions to prevent and suppress fire and environmental pollution, shall pay the U S. for any damage to its property resulting from his use, shall not cut timber without prior permission, and shall not enclose roads or trails commonly in public use. 360/ Additional provision is made for any stipulations which are considered necessary to protect the land and resources involved and the public interest in general. 361/

A permit may not be assigned without approval, and a proposed assignment must be accompanied by a statement signed by the assignee agreeing to be bound by the provisions of the permit if the assignment is approved. 362/

Investigations are scheduled at suitable intervals to determine whether the permittee is complying with the terms and conditions of the permit. 363/ A permit may be revoked upon notice if the terms and conditions of the permit have been breached. 364/

B. Lands Administered by the Forest Service

1. Easements

a. Easements Granted by the Department of Interior

Several acts of Congress authorize the Secretary of Interior to grant rights-of-way over national forest land without the consent of the Secretary of Agriculture. 365/ However, Department of Interior regulations require that applicants for rights-of-way in national forests enter such stipulations as the Forest Service may require. 366/

Applications under these statutes are filed with the BLM land office for the district in which the land is located or, if there is no such office, with the Director, BLM. When national forest lands are involved, the manager or director will transmit directly to the regional forester a tracing showing the right-of-way with a request for a report and recommended stipulations. 367/

Stipulations are prepared by regional foresters. Standard stipulations have been developed for railroad rights-of-way. 368/ Standard stipulations have also been developed for easements for telephone and telegraph lines, power transmission lines and radio-electronic sites which are issued under the Secretary of Agriculture's own authority. 369/ These may be used as a basis for the development of stipulations for easements other than railroad rights-of-way granted under the Secretary of Interior's authority. 370/ Additions are to be made to standard stipulations when needed to take care of unusual situations. 371/

The Forest Service administers all conditions of the stipulations required for the protection of the national forests. Violations are taken up directly with the easement holder. If satisfaction cannot be obtained, the violation is reported to the Department of Interior with a request for cancellation for breach or for court action to obtain compliance. 372/

Special use permits may be granted to authorize the commencement of construction in advance of approval of a right-of-way. The conditions of the permit are generally to conform to those which will be required when the easement is finally granted. 373/

b. Easements Granted by the Department of Agriculture

The Department of Agriculture itself has authority to grant easements. 374/ Apart from general policy statements, the Forest Service provisions regarding the granting of easements under these authorities are tied to the specific uses for which authority to grant the easement is given and are treated in the appropriate use sections.

The general policy of the Forest Service is to grant easements only when it is consistent with the public interest. If the granting of an easement is found to be undesirable or contrary to the public interest, or if there is no authority for granting an easement, consideration is to be given to authorization by terminable special use permit. 375/ In addition, rights-of-way involving the simpler forms of use are to be handled by terminable special use permit as the method is simpler for the Forest Service and cheaper for the user. 376/

The dimensions of rights-of-way are to be kept to the minimum required by the use and necessary for the protection of the surrounding land. 377/

2. Special Use Permits

Authority to allow the use and occupancy of National Forest lands is granted to the Secretary of Agriculture by a number of statutes. 378/ Department of Agriculture regulations provide that all uses of national forest lands, improvements, and resources 379/ are to be designated special uses and to be authorized by special use permits. 380/

In issuing special use permits, the policy of the Forest Service is to develop the public lands of the National Forests for public uses, encourage commercial development on private lands whenever they are available and logically suited to meet the need, and make public land available for a variety of uses when compatible with National Forest objectives. Public uses are always to take priority over uses of a semipublic nature, which are to take priority over private uses. Developing and operating public facilities on National Forest lands by public agencies other than Forest Service is considered uncommon, usually unnecessary, and normally undesirable. 381/

a. Interest and Tenure

Special use permits may be either annual permits or term permits. Annual permits are used to carry out the intent of the following acts: 16 U.S.C. § 551, 16 U.S.C. § 522, and 16 U.S.C. § 432. 382/ Term permits are used to carry out the intent of the following acts: 16 U.S.C. § 497, 48 U.S.C. § 316 U.S.C. § 580 (d), 43 U.S.C. § 931c, d. 383/

Annual permits are revocable instruments and may be issued without limitation as to type of use or acreage so long as the use is compatible with the management and protection objectives of the National Forest on which the use is authorized. Annual permits are generally authorized for a use of short duration and are limited to the time actually needed for exercising the use privilege. 384/ Annual permits are amendable 385/ and revocable 386/ at the discretion of the Forest Service. A suitable termination clause is included in the permit. 387/

Term permits insure a stability of tenure and are used when development or construction require large capital outlays which cannot be amortized or salvaged within a reasonably short period and when the returns of a business depend on long periods of stable and continuous use. 388/ Term periods normally are issued for a period not to exceed 20 years. The statutory limitation of 30 years under the authority of 16 U.S.C. § 497, 16 U.S.C. § 580d and 43 U.S.C. § 931c, d may be used, however, when the investments contemplated justify a longer amortization time. In any case, the period of

time involved must not be detrimental to the public interest. When the public interest allows, a term permit may be terminated by mutual consent and a new permit issued for the remainder of the term and a new period up to 30 years, say when a need to make a major improvement arises in the latter half of the term. 389/ Term permits may be revoked only when there has been a breach of the condition of the permit or when the land is required for a higher public use. 390/ Term permits issued under the authority of 16 U.S.C. § 497 are limited to a maximum of 80 acres; 43 U.S.C. § 931c, d contain no acreage limitations and are used only when there is a need for more than 80 acres of national forest land. 391/

b. Application

Any individual, corporation, association, municipality or agency of a state or local government is eligible to apply for a special use permit. 392/ The qualification of any applicant is considered before approving a special use application. Of primary interest when a public service is involved is the applicant's ability to perform according to the permit terms. Information as to the kind and quality of the service to be offered, the financial resources of the applicant, his business experience and qualifications in relation to the proposed use, and the fee offered for concession permit privileges is always considered and is specifically requested in an invitation for bid proposal. 393/

Applications for permits may be made orally, by letter, by bid in response to a prospectus, or by specially prescribed form. 394/ Each application must contain sufficient information to fully describe the use requested. This must include an exact description of the tract of land, the extent and nature of the use, the acreage of land or list of government improvements involved. It should also include information as to how often and for what period the use is contemplated and the applicants ability to satisfy the requirements of the proposed use. Additional special instructions may exist relating to the application for specific uses. 395/

The highest use of the land, based on the objective of multiple use management, must be determined before approving a special use application. Temporary occupancy and use of the land covered by an annual permit may be authorized even where there is a probability of an ultimate higher use, provided the applicant clearly understands the permit will not be renewed if the government requires the land. Special uses which furnish the greater service to the public or contribute to the economic well-being of a community will receive preference over more restrictive uses. 396/

When a concession special use opportunity is available, there is a demonstrated public need for the service, and a competitive interest exists, a prospectus will be issued and proposals invited in order to obtain the best qualified permittee and an equitable return to the Government. No concession special

use permit will be issued involving the planned investment of more than \$100,000 without first issuing a prospectus and soliciting bids. 397/

In soliciting bids, a complete prospectus with a sample permit or permits is circulated, setting forth minimum facilities and services which must be provided, construction requirements and time limits. The issuance of a prospectus is to be given adequate publicity. Bids are solicited on the basis of services required by the public and the minimum fee that will be accepted. The successful applicant is selected on the basis of the kind and quality of service proposed in terms of meeting the public need, the applicant's experience, the verification of financial resources, and the return to the Government. The Forest Service is not obligated to accept the highest bid. The objective is to select an applicant whose proposal would best serve the public need. 398/

When facilities are needed and a prospectus has produced no bids, conditions including surcharge on fees may be negotiated. However, significant departures from the prospectus made during negotiation are cause for readvertisement. 399/

c. Price and Related Terms

Special use permits may be issued free of charge under the guidelines established in the Department of Agriculture regulations which provide that the Chief of the Forest Service may authorize the issuance of special use permits without charge when the use is by a governmental agency, of a public or semipublic nature, for noncommercial purposes, in connection with an authorized utilization of national forest resources, of benefit to the Government in the administration of the national forests for similar purposes compatible with the public interest and when authorized and directed by acts of Congress. 400/ Free special uses are covered by annual permits only. 401/

Forest Service policy is not to issue a permit without charge when: 1) funds derived through the permit are used to increase the value of the improvements owned by the permittee; 2) the funds derived through the permit are used to support other activities of the permittee, including permits to states, counties, municipalities and other political subdivisions when the income derived from the use is not set aside in a trust account to be used to pay specified expenses for the area or for transfer to the United States if not needed; 3) the operation is commercial in nature; and 4) the use does not benefit the general public, the use not being considered beneficial to the public in the case of public agencies if there are restrictions on use, e. g., development for a single community's use only. 402/

When a charge is made, the minimum annual fee is \$5.00. 403/ Most fees are implemented in a permit as flat fees--fees specifically identified in the permit as to amount for a given period of time and not subject to annual change. 404/ Flat fees may be based on a percentage of actual or estimated sales, 405/ on a percentage of the on-site investment where small acreages with large investments are involved, 406/ or on a percentage of the market value of the land occupied for the permitted purpose. 407/

The exception to the use of flat fees is the graduated fee which is used in concession type operations. However, where graduated fees are expected to be less than \$1,000, a flat fee may be used. 408/ The graduated fee system involves setting a minimum fee and calculating the total fee based on sales. The fee actually collected thus fluctuates annually in line with the success of the permitted operation. 409/

A nominal flat fee may be charged semipublic and public agencies which cannot qualify for fee use because of restrictions placed on the public land. 410/ However, in the case of term permits, the preferred practice is to charge a fee commensurate with the value of the use. 411/

Fees may also be set through competitive bidding or through negotiation where facilities are needed and a prospectus has produced no bids. 412/

Permits specify the method of making payments and the date or dates upon which they are due and payable. Except where the graduated fee system is used, payments are generally specified as due on 1 January in a single unit covering the ensuing year. However, Forest Supervisors may permit semiannual or quarterly payments to avoid personal hardship to permittees if the chance of nonpayment is slight. 413/

Term permits include a clause which provides for a review and adjustment of fees at five year intervals or as specified in the permit. The charges for use under an annual permit may be adjusted at any time to reflect the value of the use, but revision normally is made at five year intervals. 414/

d. Conditions

As a matter of policy, certain general conditions are to apply to the issuance of all special use permits. All uses are to be made subject to applicable Federal and State laws, local ordinances, and the Secretary of Agriculture's regulations. All land use authorizations are to require that adequate provision be made to protect the land and resources of the United States from unnecessary damage. Nondiscrimination clauses are to be included in all instruments when appropriate. Provision is to be made for the Forest Service to approve the location of all developments and to approve the design and plans for construction of facilities prior to construction. All instruments are to provide for the prevention and control of soil

erosion and the protection of water resources. All use authorizations are to include the provision that the use privilege is subject to valid claims. Access to the National Forest across non-National Forest land is to be made the responsibility of the applicant. 415/

Printed clauses on the various permit forms cover standard requirements, 416/ and other additional standard or optional clauses for individual uses may be added. 417/

e. Transfer and Termination

Although Department of Agriculture regulations provide that special permits may be transferred, 418/ it is not the policy of the Forest Service to do so. 419/ Upon sale and transfer of the improvements covered by a special use permit, the permit terminates. A new permit will be issued to the person to whom title to the improvements has been transferred, provided continuation of the use is desirable. 420/ Before approving the issuance of a new special use permit for an established use, an analysis of the conditions of the use will be undertaken to determine whether changes in permit conditions are needed. 421/

Special use permits are terminated on expiration of the term of the permit, through agreement with the permittee, as provided by the terms of the permit, on abandonment of the use by the permittee, and after failure to pay when notice that fees are overdue has been given. 422/

Term permits may be revoked only: when there has been a breach of the condition of the permit and the permittee has been given an opportunity to show cause why the permit should not be revoked and has failed to do so; or when the land is required for a higher public use. An annual permit may be revoked for a violation of the terms or at the discretion of the Forest Service. Forest Service discretion will normally be exercised only when the land is needed for important public purposes or when the present use has become unsatisfactory or undesirable. 423/

Ownership of improvements in terminated special use cases is determined by the clauses in the permit. When a permittee is informed of revocation or termination, he is given notice of a definite date upon which all structures or improvements must be removed. When improvements have not been removed within the time allowed, they become Government property. 424/

Term permits, by their conditions, create an obligation against the Government by requiring a payment for improvements where permits in total are terminated in the public interest prior to the expiration date. If only a portion of the permit area is taken, the termination stipulation

is not effective, and the taker's obligation is determined through negotiation. When the term expires, the United States is not obligated to pay for the permittee's improvements. 425/

C. Lands Administered by the Bureau of Reclamation

In addition to his general authority to issue rights-of-way and permits over public lands for specified purposes, 426/ the Secretary of Interior is specifically authorized to grant leases, easements, and licenses affecting lands or interest in lands withdrawn and being administered under the Federal reclamation laws in connection with the construction or operation and maintenance of any project. 427/

1. Easements

Bureau of Reclamation Instructions define an easement as an instrument which grants an estate in land and is not revocable except as provided in the instrument. Rights-of-way for roads, transmission lines, and pipelines are granted through use of an easement. 428/

Lands are made available only to citizens of the United States, domestic corporations, and governmental or quasigovernmental entities. 429/

Any instrument, except a perpetual easement, is limited to a period of 50 years or less. 430/ The consent of the water user organization involved is to be obtained for any easement or right-of-way proposed for a term of 25 years or longer. 431/

Easements are granted to governmental or quasigovernmental entities and nonprofit organizations without charge and also to corporations such as railroads where reciprocal right-of-way privileges can be realized. In other cases, consideration will be given to the costs of handling and the tenure of the grant in determining the fee charged. 432/

An easement is granted on terms and conditions that are deemed adequate to protect the interests of the United States and the project for which the particular lands are being administered and to be compatible with the purposes for which the lands were withdrawn. 433/

2. Leases

Lands are made available through leases only to citizens of the United States, domestic corporations, and governmental and quasigovernmental entities. 434/ Preference in leasing may be given to project water users or local settlers or landowners by stipulating in the advertisement for bids that bids from persons residing more than a given distance from the project or particular project feature will not be considered. 435/

Any lease is to be limited to a period of 50 years or less. 436/

It is the general policy of the Bureau to execute leases after adequate advertisement for bids and to make award to the highest responsible bidder. 437/ When it is determined that advertising will not result in competitive bidding, that the cost of advertising would be disproportionate to the anticipated rentals, or when other special conditions warrant, leases may be made without advertising. All leases proposed for execution without advertising must be approved by the Regional Director. 438/

A lease is executed on terms and conditions that are deemed adequate to protect the interests of the United States and the project for which the particular lands are administered and to be compatible with the purposes for which the lands were withdrawn. 439/

Assignments of leases may be made for the unexpired period of the lease upon payment of a fee to cover the cost of approving the transfer. 440/ Subleases may be approved where the best interests of the United States and the lessee may be served thereby. 441/

Leases may be cancelled, by letter to the lessee, when the interests of the United States require, in accordance with the terms of the lease contract. Refunds will be made by the United States of any rentals collected but not earned on any terminated lease to the extent provided therein. 442/

3. Licenses

Licenses are defined as instruments granted an authority to do an act or acts on land under the control of the Bureau without gaining an interest therein. Acts such as the construction and placement of a road, pipeline, transmission line, telephone line pump and flume are granted through use of a license. 443/

Lands are made available through license only to citizens of the United States, domestic corporations, and governmental or quasi-governmental entities. 444/

Any license is limited to a period of 50 years or less. 445/

Licenses are granted to governmental or quasi-governmental entities or to others giving reciprocal privileges without charge. Fees for licenses to companies or individuals for various uses are to be established on a region-wide basis and, at the least, to cover the cost of negotiating the instrument. 446/

A license is issued on terms and conditions that are deemed to be adequate to protect the interests of the United States and the project

for which the particular lands are being administered, and to be compatible with the purposes for which the lands were withdrawn. 447/

When a structure is erected by a licensee for his own convenience and the Government receives no benefit therefrom, the license is to provide for the removal of the structure upon termination of the license at the expense of the licensee. 448/

When it is determined that Reclamation-withdrawn lands are no longer needed for reclamation purposes and such lands are covered by license, the license is to be terminated prior to submitting a recommendation for the revocation of the Reclamation withdrawal. 449/

4. Permits

Permits are defined as instruments giving a personal privilege which will usually be temporary and revocable. Permits are issued only to allow the removal of sand, gravel, or other building materials 450/ and to grant permissive use of such as boating or the placement of boat docks. 451/

Lands are made available through permit only to citizens of the United States, domestic corporations, and governmental or quasi-governmental entities. 452/

Any permit is limited to a period of 50 years or less. 453/

Removal of materials may be permitted without charge if for use by a public agency in the construction of public roads or streets within the project or its immediate vicinity. In other cases, an advertisement calling for competitive bids is to be issued or the local prevailing rate is to be charged. 454/

A permit is issued on terms and conditions adequate to protect the interests of the United States and the project for which the lands are being administered, and to be compatible with the purposes for which the lands were withdrawn. 455/

Footnotes

1. 43 U.S.C. §§ 711-731 (1964).
2. See: Jones v. Petaluma, 36 Cal. 230 (1868); Aleman v. City of Petaluma, 37 Cal. 553 (1869); Town Cite of Cement, 36 L.D. 85 (1907).
3. Land orders establishing such reservations may be made by the Secretary of the Interior on his own motion, or pursuant to petition requesting the reservation filed with the State Director for the area in which the lands are situated. 43 C.F.R. § 2242.0-3 (1969).
4. The President's finding that public lands are such as may be reserved for townsite purposes is conclusive in the absence of fraud. United States v. Norton, 19 F. 2d 836 (5th Cir. 1927).
5. 43 U.S.C. §§ 711, 712 (1964); Exec. Order No. 9337, 3 C.F.R. 1274 (Cum. Supp. 1943), superceded by Exec. Order No. 10355, May 26, 1952, 17 F.R. 4831; 43 C.F.R. §§ 2242.1-1, 1-2 (1969).
6. 43 U.S.C. § 712 (1964); 43 C.F.R. §§ 2242.1-1, -2 (1969).
7. 43 C.F.R. § 2242.0-6 (1969).
8. Id. § 2242.1-2(c).
9. Public lands withdrawn by Executive Orders 6910, November 26, 1934 or 6964, February 5, 1935 are not subject to occupation for townsite purposes unless first classified for such occupation 43 C.F.R. § 2242.2-1 (1964).
10. 43 U.S.C. § 713 (1964); 43 C.F.R. §§ 2242.2-1, 2-2, 2-3 (1969).
11. 43 U.S.C. § 713 (1964); 43 C.F.R. § 2242.2-2(a)(1) (1969).
12. Memorandum from the Associate Solicitor, Division of Public Lands, Department of the Interior to the Director of the Bureau of Land Management, M-36486 (October 30, 1957).
13. 43 U.S.C. § 713 (1964); 43 C.F.R. § 2242.2-9 (1969).

14. Id. § 2242.2-5 (1969).
15. 43 C.F.R. § 2242.2-4 (1968).
16. 43 U.S.C. § 713 (1964), 43 C.F.R. § 2242.2-6 (1969).
17. 43 C.F.R. § 2242.2-6 (1969).
18. Id. § 2242.2-8.
19. Id. § 2242.0-6.
20. Id. § 2242.1-2(c).
21. Id. § 2242.2-7.
22. Mill Side Lode, 39 L.D. 356 (1910).
23. Brady's Mortgagee v. Harris, 29 L.D. 426 (1900); Gregory Lode Claim, 26 L.D. 144 (1898).
24. 43 C.F.R. § 2242.1-1 (1969).
25. Public lands withdrawn by Executive Orders 6910 or 6964 are not subject to townsite settlement until such settlement has been authorized by classification. 43 C.F.R. § 2242.3-1 (1964).
26. 43 U.S.C. § 718 (1964); 43 C.F.R. §§ 2242.3-2, -3 (1969).
27. Id.
28. 43 C.F.R. § 2242.3-5 (1969).
29. Letter from Manager, Riverside Office Bureau of Land Management to Cal. State Director, 0492-C.04 (October 8, 1965).
30. Id.
31. 43 U.S.C. § 719 (1964), 43 C.F.R. § 2242.3-6 (1969); County of Placer v. Lake Tahoe Ry. Co., 58 Cal. App. 764 (1922).
32. County of Placer v. Lake Tahoe Ry. Co., 58 Cal. App. 764 (1922).

33. The entry shall in its exterior limit be made in conformity to the legal subdivisions of the public lands authorized by law; and when the inhabitants are in number 100 and less than 200, shall embrace not exceeding 320 acres; and in cases where the inhabitants are more than 200 and less than 1,000, shall embrace not exceeding 640 acres; and where the number of inhabitants is 1,000 and over, shall embrace not exceeding 1,280 acres; but for each additional 1,000 inhabitants, not exceeding 5,000, a further grant of 320 acres shall be allowed. 43 U.S.C. § 720 (1964); 43 C.F.R. § 2242.3-4 (1964).
34. 43 U.S.C. § 720 (1964); 43 C.F.R. § 2242.3-9 (1969).
35. 43 U.S.C. § 727 (1964); 43 C.F.R. § 2242.3-9 (1969).
36. 43 C.F.R. §§ 2242.3-4, -9 (1969).
37. Harper v. Grand Junction, 16 L.D. 127 (1893).
38. 43 U.S.C. § 725 (1964).
39. 43 U.S.C. § 718 (1964); 43 C.F.R. § 2242.3-3 (1964).
40. Ashby v. Hall, 119 U.S. 526, 529-30 (1886).
41. 43 C.F.R. §§ 2242.3-7, 2242.7-1 (1969).
42. Id. § 2242.3-7.
43. Act of April 16, 1906, 43 U.S.C. § 561 (1964).
44. 43 C.F.R. § 2242.4-1 (1969).
45. Id.
46. Id.
47. 43 C.F.R. § 2242.4-2 (1969).
48. Id. §§ 2242.4-2, 1-2 (1969).
49. Id. § 2242.4-4.
50. Id. § 2242.4-3.

51. Id. §§ 2242.4-2, 0-3.
52. Id. §§ 2242.4-2, 1-2(c) (1969).
53. 43 U.S.C. §§ 561, 569; 43 C.F.R. § 2242.4-5.
54. 43 U.S.C. § 566 (1964).
55. Id. § 570; C.F.R. § 2242.5-1 (1969).
56. 43 U.S.C. § 571 (1964).
57. Id. §§ 569(c), 570.
58. Act of July 31, 1958, 7 U.S.C. § 1012(a); 16 U.S.C. § 478(a)(1964).
59. 7 U.S.C. § 1012(a) (1964); 16 U.S.C. § 478(a) (1960).
60. F.S. Manual § 5481.41a (Oct. 1965).
61. F.S. Manual § 5481.41-2 (Amend. No. 135, October 1965).
62. Department of Agriculture's response to statements for the record, Hearing Before the P.L.L.R.C., p. 284, line 14 insert (April 6, 1968). 19 F.R. 74 (Jan. 2, 1954). F.S. Manual § 5481.41-1 (Oct. 1965, Amend. No. 135).
63. 28 F.R. 10828 (October 9, 1963), F.S. Manual § 5481.41-1 (Amend. No. 135, October 1965).
64. Id. § 5481.41-2.
65. Id. § 5481.41-2.
66. Id. § 5481.41c.
67. Id.
68. Id. F.S. Manual § 5481.41a (Amend. No. 135, October 1965).
69. Id. §§ 5481.41-2, 41-a and 41-b.
70. 7 U.S.C. § 1012(a) (1964), 16 U.S.C. § 478(a) (1960), Dept. of Agriculture's response to statements for the record, transcript of Agriculture's portion of the Hearing Before the P.L.L.R.C. p. 284, line 14 insert (April 6, 1968); F.S. Manual § 5481.41-2 (Amend. No. 135, October 1965).

71. Id. § 5481.41d.
72. Id. § 5481.44-2.
73. Id. § 5481.41e.
74. Id.
75. Id. § 5481.41-2.
76. Id. § 5481.41e.
77. 7 U.S.C. § 1012(a) (1964); 16 U.S.C. § 478(a) (1960).
78. Id. F.S. Manual § 5481.41c; Department of Agriculture's response to statements for the record; Transcript of Agriculture's portion of the Hearing Before the P. L. L. R. C., p. 284, line 14 insert (April 6, 1968).
79. F.S. Manual § 5481.41-2.
80. 43 U.S.C. § 682(a) (1964).
81. The public lands available under the Act include public lands withdrawn by Executive Orders No. 6910 and 6964 and public lands withdrawn or reserved by the Secretary of the Interior for any purpose. The Act does not apply to lands withdrawn by the Secretary solely under delegated authority or to reservations such as National forests, National parks or National monuments. 43 C.F.R. § 2233.0-3 (1964). The Act of June 8, 1954 amended the Act of 1938 by, in part, extending the leasing, but not the selling provisions to unsurveyed lands.
82. 43 U.S.C. § 682(a) (1964).
83. 5 B.L.M. Manual § 3.1.3 (Release No. 248, April 15, 1963).
84. 43 C.F.R. § 2233.0-3 (1969).
85. Id. §§ 2233.0-3, 1-1(e)(4) (1969).
86. 5 B.L.M. Manual § 3.1.201-203 (Release No. 248, April 15, 1963).
87. 5 B.L.M. Instruction Memo No. 65-11 (Jan. 12, 1965).

88. 43 C.F.R. § 2410.1-3(d)(8) (1969).
89. B. L. M. Instruction Memo No. 65-11 (Jan. 12, 1965).
90. Id.
91. While the meaning of this statement is not explicated in the Manual, presumably it means that generally land is not arbitrarily divided into five acre tracts just in order to be made available for sale under the Small Tract Act.
92. B. L. M. Manual (Release 2-34, July 1, 1968).
93. 43 C.F.R. § 2233.0-2(a) (1969).
94. Id. 5 B. L. M. Manual § 3.1.204 (Release No. 221, May 18, 1962).
95. Id. § 3.1.205.
96. 43 C.F.R. § 2233.0-2(6) (1969).
97. 5 B. L. M Manual § 3.1.207B (Release No. 221, May 18, 1962).
98. Additionally, revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands in Oregon under the jurisdiction of the Department of the Interior will be classified for lease only. 5 B. L. M. Manual § 3.1.207C (Release No. 221, May 18, 1962). Such lands are outside the scope of this study.
99. 43 C.F.R. § 2233.1-1(d) (1969).
100. Id. § 2233.1-1(a).
101. Id. § 2233.0-6(b).
102. 5 B. L. M. Manual § 3.1.25 (Release No. 248, April 15, 1963).
103. 43 U.S.C. § 682(c) (1964); 43 C.F.R. §§ 2233.0-2(b), 0-6(a) (1969).
104. 43 C.F.R. § 2233.0-6(a)(3) (1969).

105. 5 B. L. M. Manual § 3.1.280 (Release No. 129, June 18, 1958).
106. 43 C. F. R. § 2233.3-4 (1969).
107. Id. § 2233.3-1(b).
108. Id. § 2233.1-4(b).
109. Id. § 2233.3-3.
110. Id. § 2233.3-2.
111. Id. § 2233.3-5.
112. Id. § 2233.3-1(c).
113. Id. § 2233.4.
114. Id. § 2233.7.
115. Id. § 2233.7(b).
116. The Dredge Corporation, A-29997, Nev. 046124, June 15, 1964
117. 43 C. F. R. § 2233.5(b) (1969).
118. Id.
119. 43 U. S. C. § 1421 (1964).
120. The public lands subject to the Act include public lands withdrawn by Executive Orders 6910 and 6964 and not otherwise withdrawn or reserved and public lands within grazing districts established under § 1 of the Taylor Grazing Act of 1934 and not otherwise withdrawn or reserved. 43 C. F. R. § 2243.2-1(c) (1) (1969).
121. "Residential" refers to single or multi-family dwellings or combinations thereto, and related community facilities, both seasonal and year-round. 43 C. F. R. § 2410.0-5 (1969).
122. "Commercial" refers to the sale, exchange, or distribution of goods and services. Id.

123. "Industrial" refers to the manufacturing, processing, and testing of goods and materials, including the projection of power. Id.
124. 43 U.S.C. § 1421 (1964).
125. 43 C.F.R. §§ 2243.2-3(a), 2411 et seq. (1969).
126. Id. §§ 2410.1-3(a), (c).
127. Id. §§ 2410.1-3(a), (b).
128. Id. §§ 2410.1-3(d)(1), (2), (3).
129. Id. § 2410-1-3(e).
130. Id. §§ 2410.1-3, 2242.2-1(b)(2).
131. B.L.M. Manual (Release 2-34, §§ 2410.1.13G(1), (2), July 1, 1968).
132. 43 U.S.C. § 1422 (1964).
133. Id.
134. Id. §§ 1421, 1425(b), (c).
135. 43 U.S.C. § 1421 (1964); 43 C.F.R. § 2243.2-1(a) (1969).
136. 43 U.S.C. § 1423 (1964).
137. 43 C.F.R. § 2243.2-5(a) (1969).
138. Id. §§ 2243.2-5(c), (d), (e).
139. 43 U.S.C. § 1424 (1964).
140. Id. 43 C.F.R. § 2243.2-1(b)(4) (1969).
141. 43 U.S.C. § 1424 (1964).
142. 43 U.S.C. § 869(a)(c)(1964).
143. No patent will be issued under the Act unless and until the land is officially surveyed. 43 C.F.R. § 2232.2-1(d) (1969).

144. 43 U.S.C. §§ 869(a), (c) (1964); 43 C.F.R. § 2232.0-7 (1969).
145. 43 U.S.C. § 869 (c) (1964); 43 C.F.R. § 2232.2-1(a) (2) (1969).
146. Since passage of the Classification and Multiple Use Act of 1964, this authorization would extend to uses authorized by the Public Land Sale Act of 1964. See 43 C.F.R. § 2410 et. seq. (1969).
147. 5 B.L.M. Manual § 2.26.100 (Release 253, June 21, 1963).
148. See H.R. Rep. No. 734, 69th Cong., 1st Sess. (1926).
149. 5 B.L.M. Manual § 2.26.100 (Release 253, June 21, 1963).
43 C.F.R. § 2410 et seq. (1969); B. L. M. Instruction Memo No. 68-429 (Nov. 15, 1968).
150. 43 C.F.R. § 2410 et. seq. (1969); B. L. M. Instruction Memo No. 68-429 (Nov. 15, 1968); 5 B. L. M. Manual § 3.32A (Release 97, March 8, 1957).
151. 43 U.S.C. § 2410.1-3(c)(3) (1964).
152. 5 B. L. M. Manual § 3.3.2 B, C (Release 97, March 8, 1957).
153. 43 U.S.C. § 869(a) (1964); 43 C.F.R. § 2232.0-1(a) (1969).
154. 5 B. L. M. Manual § 2.26.7E (Release 176, Dec. 11, 1959).
155. 43 U.S.C. § 869(b) (1964); 43 C.F.R. § 2232.2-1(c) (1969).
156. Memorandum from Director, B. L. M. to State Supervisors (May 13, 1960).
157. A definitely proposed project is defined as one which has been authorized by competent authority irrespective of whether or not it has been financed and otherwise fully implemented, provided there exists the probability that it will be fully implemented within a reasonable time. 43 C.F.R. § 2232.2-1(b) (1969).
158. 5 B. L. M. Manual § 2.26.13H.

159. 43 C.F.R. § 2232.2-(1)(a) (1969); 5 B.L.M. Manual § 2.26.13 (Release 176, Dec. 11, 1959); Id., § 3.3.7 (Release 97, March 8, 1957).
160. 43 U.S.C. § 869-1 (1964); 43 C.F.R. § 2232.2-3 (1969); 5 B.L.M. Manual § 2.26.13, 14 (Release 176, Dec. 11, 1959); Id. § 3.3.7(c), (Release 97, March 3, 1957).
161. 5 B.L.M. Manual §§ 2.26.14A(1), (2) (Release 176, Dec. 11, 1959).
162. Id. § 2232.23 A2, (Release 2-23, Aug. 2, 1966).
163. Id. § 3.35(B) (Release 97, Aug. 8, 1957).
164. While timber is normally sold at its fair market value along with the land, a number of alternatives are available when the patentee is unwilling or unable to pay for it in full: the timber may be reserved to the United States with the right to sell it under the timber sale regulations at the discretion of the Bureau; the timber may be reserved to the United States and a lease with option to purchase the timber at its fair market value issued to the patentee; title to the timber may be passed with the land, without additional compensation, but with any proceeds from its sale to be turned over to the United States; or timber may be reserved to the United States to permit sanitation and cutting. B.L.M. Manual § 2232.25B (Release 2-23, Aug. 3, 1966).
165. B.L.M. Manual § 2232.23A1 (Release 2023, March 2, 1966).
166. 43 C.F.R. 2232.2-3 (1969).
167. 5 B.L.M. Manual §§ 2.26.13F, G (Release 176, Dec. 11, 1959); Id. § 3.3.7 (Release 30, Dec. 10, 1954).
168. Id. § 2.26.6B(1) (Release 259, Jan. 17, 1964).
169. 43 U.S.C. § 869-1 (1964).
170. 43 C.F.R. § 2232.2-1. (g) (1969).
171. Id. § 2232.2-3 (c), (d), (e), (1969).
172. 5 B.L.M. Manual § 3.3.10 (Release 30 Dec. 16, 1954).

173. Id. § 3.3.9 (Release 30 Dec. 16, 1954).
174. 43 U.S.C. § 869-2, 869-3 (1964) 33a, 43 C.F.R. § 2232.2-4 (1969).
175. 5 B. L. M. Manual § 2.26.21-23 (Release 268 June 21, 1965).
176. Id. § 2.26.17; (Release 176 Dec. 11, 1959); Id. § 3.3.8 (Release 30 Dec. 16, 1954).
177. Id. § 2.26.17-20 (Release 176 Dec. 11, 1959).
178. Id. § 3.3.8 (Release 30 Dec. 16, 1954).
179. Nonprofit associations and nonprofit corporations, for the purposes of the special pricing programs, are defined as any institution, organization or association which has been established according to local law and is held by the IRS to be tax-exempt. B. L. M. Manual § 2232.05A1. (Release 2-23 Aug. 2, 1966).
180. Id. § 2.26.79 (Release 206 June 2, 1961). Applications for such uses are referred to the appropriate Bureau of Outdoor Recreation regional office for evaluation and comments. Id. § 2232.237 (a) (Aug. 2, 1966).
181. Application for such uses are referred to the appropriate Department of H. E. W. regional office for evaluation and comments. B. L. M. Manual § 2232.237 (b) (Aug. 2, 1966).
182. Id.
183. B. L. M. Manual § 2232.23 B2 (Release 2-23 Aug. 2, 1966). Applications for such uses are referred to the Director, Bureau of Prisons, Department of Justice for his recommendations as to whether the applicant is an appropriate agency to handle the proposed development, whether the proposal comprises a desirable and suitable penal facility, whether the proposed developments are proper and adequate for the purposes they are intended to serve, whether the proposals conform to a state-wide plan for penal institutions, if applicable, and whether the acreage applied for is proper in light of actual needs. B. L. M. Manual § 2232.237(c). App. 3a. (Release 2-23 Aug. 2, 1966).

184. Memo from Director, Bureau of Land Management to State Supervisors dated July 21, 1961.
185. 5 B. L. M. Manual § 2.26.77 (Release 217 Jan. 23, 1962); Id., 2.26.95, 115, (Release 223 May 23, 1962).
186. Id. § 2.26.77 (Release 217 Jan. 23, 1962).
187. Id. § 2.26.94, 95, 114, 115 (Release 223 May 23, 1962).
188. Id. § 2232.23 B6 (Release 2-23 Aug.2, 1966).
189. Id. § 2232.23 B4 (Release 2-23 Aug. 2, 1966).
190. See App. 1-3 infra.
191. See note 90 supra.
192. B. L. M. Manual 2232.23 B5 (Release 2-23 Aug. 2, 1966).
193. 40 U.S.C. § 471 et. seq.
194. 40 U.S.C. § 471 (1964); Finsky v. Union Carbide and Carbon Corp., 249 F. 2d 449 (7th Cir. 1957) cert. denied, 356 U.S. 957 (1957).
195. 40 U.S.C. § 472(d) (1964).
196. Executive agencies are defined as executive departments or independent establishments in the executive branches of the Government, including any wholly owned Government corporation, 40 U.S.C. § 472(a) (1964).
197. Id. § 472(e) (1964).
198. Federal agencies are defined as any executive agency or any establishment in the legislative or judicial house of the Government, except the houses of Congress and the Capitol Architect, 40 U.S.C. § 472(b) (1964).
199. Id. §§ 483(b), (c) (1964); 41 C.F.R. § 101-47.203-2 (1969).
200. 40 U.S.C. § 483(c) (1964); 41 C.F.R. §§ 101-47.201-2, 203-1, 203-3 (1969).

201. 40 U.S.C. § 483(b) (1964); 41 C.F.R. § 101-47.201-2 (1969). Authority is delegated to the Secretary of Defense, the Department of Agriculture, and the Department of the Interior to dispose of directly, in a manner deemed most advantageous to the United States, any excess real property under the control of the respective departments which is determined by the department not to be required for the needs and responsibilities of all Federal agencies and which has a total estimated fair market value of less than \$1,000. Id., §§ 101-47.601, 602, 603. Authority is also delegated to the Secretary of the Interior and the Secretary of HEW to transfer and retransfer to each other directly, upon request, any of the property of either agency which is being used and will continue to be used in the administration of any functions relating to the Indians. Id. § 101-47.604.
202. 41 C.F.R. § 101-47.202.6 (1969).
203. 43 C.F.R. § 2312.1-1 (1969).
204. Id. § 2312.1-2(a).
205. Id. § 2312.1-3.
206. 41 C.F.R. § 101-47.203-5 (1969).
207. 40 U.S.C. §§ 472(g), 484 (1964); 41 C.F.R. § 101-47.204-1 (1969).
208. By sale, exchange, lease, permit, or transfer. 40 U.S.C. § 484(c) (1964).
209. Id. §§ 484(a), (c); 41 C.F.R. §§ 101-47.302-1, 303-1 (1969).
210. 41 C.F.R. § 101-47.302-2(a) (1969). A holding agency is defined as the Federal agency which has accountability for the property involved. Id. § 101-47.103-7.
211. 40 U.S.C. §§ 484(a), (c) (1964); 41 C.F.R. § 101-47.302-3 (1969).
212. 40 U.S.C. §§ 486(d), (e) (1964).

213. Id. §§ 484(k) (1) (A), (B). For a discussion of disposals of surplus property assigned to the Secretary of the Interior, see supra.
214. 41 C.F.R. §§ 101-47.203-10, 312 (1969).
215. 40 U.S.C. §§ 483(a), 756(f) (1964); 41 C.F.R. § 101-47.201-1 (1969).
216. 41 C.F.R. §§ 101-47.203-5, 203-7 (1969).
217. 40 U.S.C. § 483(a) (1964).
218. 41 C.F.R. § 101-47.203-7(f) (1969).
219. Id. § 101-47.203-7(f) (2) (i).
220. §§ 101-47.203-7(f) (2) (ii) (A)-(D).
221. Id.
222. Id. § 101-47.203-7(f) (2) (ii) (E).
223. The purpose of the Act is to provide for financial control over Government corporations in the form of business-type budgets and commercial-type audit reports. In general, the Act applies to both wholly owned and mixed-ownership Government corporations. 31 U.S.C. § 841 (1954).
224. 41 C.F.R. § 101-47.203-7(f) (i) (1969).
225. Id. § 101-47.203-7(e).
226. 40 U.S.C. §§ 483, 486(c) (1964).
227. 41 C.F.R. § 101-47.303-2 (1969).
228. Id. §§ 101-47.303-2(b), (f).
229. Id. § 101-47.4906.
230. Id. § 101-47.303-2.
231. Id. § 101-47.4906.

232. Id. § 101-47.303-2(i).
233. The Act contains no general restrictions on the class of purchasers eligible to obtain surplus property. 40 U.S.C. § 483(a), (c) (1964).
234. 41 C.F.R. § 101-47.304-1 (1969).
235. §§ 101-47.304-3, 304-4.
236. § 47.303-2; BR Instructions § 345.5.7B.
237. Except where property is to be disposed of for airport or historic monument purposes or where the estimated fair market value of property to be offered on a competitive sale basis does not exceed \$2,500, it must be appraised for its fair market or fair rental value. 41 C.F.R. § 101-47.303-4 (1969).
238. 41 C.F.R. § 101-47.304-9 (1969); Reclamation Instructions § 345.5.7. Eligibility of specific organizations is contained in 41 C.F.R. § 101-47.4905 (1969), and Exhibit 5, App. C, General Service Administration Reg. 2-V-301.02.
239. 41 C.F.R. § 101-47.304-7 (1969).
240. Id.
241. Id. § 101-47.305-1(b).
242. Id. 41 C.F.R. § 101-47.305-1(d).
243. Id. §§ 101-47.304-4(a), (b).
244. Id. §§ 101-47.304-4(a)(2), (3), (4).
245. Id. § 101-47.304-4(b).
246. Id. § 101-47.312.
247. Id. § 101-47.308-5.
248. 40 U.S.C. §§ 484(a), (c) (1964).
249. Id. §§ 484(k), (2).

250. Id.
251. 41 C.F.R. § 101-47.302-2; (1969) E. g. General Service Administration Reg. 2-V-201.00 delegated to the Secretary of the Interior. The authority has been redelegated, for example, over reclamation lands to the Commissioner of the Bureau of Reclamation, who in turn has delegated to Regional Directors. Reclamation Instructions § 345.5.1-4.
252. See supra notes 96-121.
253. 41 C.F.R. §§ 101-47.304-4(e), (f) (1969).
254. Id. §§ 101-47, 307-1.
255. 41 C.F.R. §§ 101-47.304-4(d), 307-2(a) (1968).
256. 40 U.S.C. § 484 (k) (1) (A), (B) (1964).
257. 41 C.F.R. § 101-47.203-5 (1969).
258. Id. § 101-47.204.1.
259. Id. § 101-47.303-2, 308-4.
260. 41 C.F.R. § 101-47.308-4(d) (1969).
261. Id. § 101-47.308-4(e).
262. Id. § 101-47.308-4(h).
263. Id. § 101-47.308-4(i)(j).
264. 40 U.S.C. § 484(k)(1)(C) (1964).
265. 40 U.S.C. § 484(k)(2)(A), (B) (1964); 41 C.F.R. § 101-47.308-4 (k)(1) (1969).
266. 43 U.S.C. § 1171.
267. The term "isolated or disconnected tract" is defined in the Department of the Interior regulations as a tract of one or more contiguous legal subdivisions completely surrounded by lands held in non-Federal ownership or so effectively

separated from other Federally-owned lands by some permanent withdrawal or reservation as to make its use with such lands impracticable. 43 C.F.R. § 2243.0-5(d) (1969).

- 268. 43 U.S.C. § 1171 (1964). The "public domain" and "public lands" referred to are defined in the Department of the Interior regulations as including any vacant, unappropriated, unreserved public lands, public lands withdrawn by Executive Orders 6910 and 6964 and not otherwise withdrawn or reserved and public lands within grazing districts established under § 1 of the Taylor Grazing Act and not otherwise withdrawn or reserved. Such lands must be officially surveyed. 43 C.F.R. § 2243.0-5(a) (1969).
- 269. Id.
- 270. 43 C.F.R. § 2243.0-2 (1969). See also: B.L.M. Manual § 2243.03 (Release 2-8, 29 Mar. 1965). This constitutes a reversal of earlier B.L.M. policy which was to exercise the discretionary authority to order lands into the market by furthering a conservation policy in the management and disposal of Federal lands. 5 B.L.M. § 2.15 (Release 118, 17 May 1958).
- 271. 5 B.L.M. § 2.1.5B, (Release 118, Apr. 7, 1958).
- 272. 43 C.F.R. § 2410.1-3 (1969); B.L.M. Manual § 2710, (Release 2-40, Sept. 9, 1969).
- 273. 43 C.F.R. §§ 2243.0-7(c), -5(e) (1969).
- 274. B.L.M. Manual § 2243.07C, (Release 2-8, Mar. 29, 1965).
- 275. 43 C.F.R. § 2243.0-5(g) (1969).
- 276. 43 U.S.C. § 1171 (1964); 43 C.F.R. §§ 2243.0-7(a), (b) (1969).
- 277. 5 B.L.M. § 2.1.6A, (Release 118, Apr. 7, 1958); B.L.M. Manual § 2243.07A (Release 2-8, Mar. 29, 1965).
- 278. 43 C.F.R. §§ 2243.1-2, -3 (1969).

279. Preference right applicants must submit proof of whole title to the contiguous lands. Id. § 2243.1-4(b) (2).
280. Id. § 2243.1-4.
281. For example, where it is determined after a public sale has been held and prior to the issuance of a cash certificate that the land is in the influence of expanding cities and towns and the land uses are changing to more intensive uses, it is proper to vacate and cancel the sale. Bernard E. Loper, Los Angeles 0134254 (Nov. 7, 1960).
282. 43 C.F.R. § 2243.1-5 (1969).
283. 5 B.L.M. § 2.1.5C, (Release 118, April 7, 1958).
284. Id.
285. 43 U.S.C. §§ 374, 375, 375(b), 424 (1969).
286. 43 U.S.C. § 416 (1964); 43 C.F.R. § 2323.0-1 (1969).
287. 43 C.F.R. § 2323.1-1 (1969).
288. 43 U.S.C. §§ 436, 437 (1964); 43 C.F.R. § 2323.0-3 (1969).
289. 43 U.S.C. § 374 (1964).
290. Id. § 375.
291. Id. §§ 424, 424a.
292. Id. § 375 (b).
293. 43 C.F.R. § 402.3 (1969).
294. Id. § 402.5 (a).
295. Id. § 402.4.
296. 43 U.S.C. §§ 374-375a (1964); 43 C.F.R. § 402.6-8 (1969).
297. 43 U.S.C. §§ 374, 375 (1964).

298. Id.
299. 43 C.F.R. §§ 402.2(b), (c) 402.6, 7 (1969).
300. Id. § 402.8(a).
301. Id. §§ 402.2(b), (c).
302. 43 U.S.C. § 375c (1964).
303. Id. §§ 424, 424a.
304. Id. §§ 375d, 424c; 43 C.F.R. § 402.9 (1969).
305. 43 U.S.C. §§ 423, 424c (1964).
306. These procedures do not apply to the obtaining of rights-of-way by Federal agencies over unreserved, or withdrawn, or reserved public domain lands. Such rights-of-way may be obtained, with the consent of the agency having jurisdiction or control over the lands, under the principles of the instructions dated 13 January 1916, which provide that where roads, telephone lines, cabins, fences or other improvements necessary for the proper and economical administration, protection, and development of national forest lands have been actually constructed and are being maintained, or survey has been made, and the area needed for improvement definitely fixed, and construction provided for, and the lands are thereafter disposed of under any public land law, the final certificate and patent are to expect such portion thereof as is devoted to public purpose. 43 C.F.R. 2234.1-1 (1969); 44 L.D. 513 (1916).
307. 43 U.S.C. § 946-949 (1964); 43 U.S.C. § 952-955 (1964); 23 U.S.C. § 317 (1964); 23 U.S.C. § 107(d) (1964); 30 U.S.C. § 185 (1964); 43 U.S.C. §§ 934-939 (1964); 43 U.S.C. § 956 (1964); 16 U.S.C. § 524 (1964); 16 U.S.C. § 525 (1964); 43 U.S.C. § 932 (1964); 43 U.S.C. § 951 (1964); 43 U.S.C. § 950 (1964); 43 U.S.C. § 959 (1964); 43 U.S.C. § 961 (1964); 43 U.S.C. § 931c, d (1964).

308. 43 C.F.R. § 2234.1-1(b) (9) (1969); 5 B.L.M. Manual § 3.8.4A (Release No. 196, 1960).
309. 43 C.F.R. § 2234.1-4(a) (3) (1969).
310. Id. § 2234.1-3 (d) (1969).
311. See 16 U.S.C. § 797 (1964).
312. 43 C.F.R. § 2234.1-3 (e) (1969).
313. 5 B.L.M. Manual § 3.8.5 (Release No. 196, 1960).
314. B.L.M. Instruction Memo No. 64-46, January 27, 1964).
315. 43 C.F.R. § 2234.1-2 (c) (1969).
316. Id. § 2234.1-2 (a) (1) (1969).
317. Id. § 2234.1-2 (d) (1969).
318. Id. § 2234.1-2 (d) (vi) (1969).
319. Id. § 2234.1-3 (a) (1) (1969).
320. 5 B.L.M. Manual § 3.8.21 G (Release No. 265, 1964).
321. 43 C.F.R. § 2234.1-3 (a) (3) (1969); 5 B.L.M. Manual § 3.8.90 (Release No. 196, 1960).
322. 43 C.F.R. § 2234.1-3 (b) (1969); 5 B.L.M. Manual § 3.8.7 (Release No. 196, 1960).
323. 43 C.F.R. § 2234.1-3 (b) (1) (1969).
324. 5 B.L.M. Manual § 3.8.7 (Release No. 196, 1960).
325. 43 C.F.R. § 2234.1-3 (b) (2) (1969).
326. 5 B.L.M. Manual § 3.8.20 (Release No. 265, 1964).
327. 43 C.F.R. § 2234.1-6 (c) (1969).
328. Id. §§ 2234.1-6 (a), (b) (1969).

329. Id. § 2234.1-6 (e) (1969).
330. 5 B.L.M. Manual § 3.8.22 (Release No. 265, 1964).
331. B.L.M. Manual Supp. § 2234.16A (release No. 2-12, 1968).
332. 43 C.F.R. § 2234.1-3 (c) (1969).
333. Id.
334. Id. § 2234.1-4 (b) (1) (1969).
335. Id.
336. 5 B.L.M. Manual § 3.8.30 (Release No. 196, 1960).
337. 43 C.F.R. § 2234.1-5 (c) (1) (1969); 5 B.L.M. Manual § 3.8.85 (Release No. 196, 1960).
338. 43 C.F.R. §§ 2234.1-5(a) (1969), 2234.1-4 (b) (2) (1969);
5 B.L.M. Manual §§ 3.8.50 (Release No. 264, 1964), 3.8.75 (Release No. 196, 1960).
339. 43 U.S.C. §§ 2, 1201 (1964).
340. 43 C.F.R. § 2236.0-2 (a) (1969).
341. 5 B.L.M. Manual § 3.4.G (Release No. 119, 1958).
342. 43 C.F.R. § 2236.0-2 (a) (1969).
343. 5 B.L.M. Manual § 3.4.4A (Release No. 119, 1958).
See 59 L.D. 313 (1946).
344. 5 B.L.M. Manual §§ 3.4.4B C, F (Release No. 119, 1958).
345. 5 B.L.M. Manual § 3.4.40 (Release No. 123, 1958).
346. 43 C.F.R. § 2236.1-1 (a) (1969).
347. Id. § 2236.1-3 (c) (1969).
348. 5 B.L.M. Manual § 3.4.1 (Release No. 119, 1958).

349. 43 C.F.R. § 2236.1-3(a) (1969).
350. 5 B.L.M. Manual §§ 3.4.4D, E (Release No. 119, 1958).
351. Id.; 54 L.D. 155 (1933).
352. U.S. Dept. of Int., B.L.M., Form 4-972, April, 1958. Special Land-Use Application and Permit.
353. 43 C.F.R. § 2236.1-3 (a) (2) (1969).
354. 5 B.L.M. Manual § 3.4.9F (Release No. 119, 1958).
355. 43 C.F.R. § 2236.1-4 (a) (1969).
356. Special Land Use Application and Permit Form, Supra Note 352.
357. 5 B.L.M. Manual § 3.4.1-A (Release No. 119, 1958).
358. 43 C.F.R. § 2236.1-4(b) (1969).
359. 5 B.L.M. Manual § 3.4.11 (Release No. 119, 1958);
5 B.L.M. Manual § 2.26.14
360. Special Land-Use Application and Permit, supra note 352.
361. 43 C.F.R. § 2236.1-3 (b) (1969).
362. Id. § 2236.1-5 (c) (1969).
363. 5 B.L.M. Manual § 3.4.17 (Release No. 119, 1958).
364. 43 C.F.R. s 2236.1-3 (a) (1969).
365. 16 U.S.C. § 525 (1964); 43 U.S.C. §§ 946-949 (1964);
43 U.S.C. § 951 (1964); 16 U.S.C. § 524 (1964); 30 U.S.C. §
185 (1964).
366. 43 C.F.R. § 2234.1-3 (d) (1969).
367. F.S. Handbook § 2751.41 (September 1958).
368. See Exhibit III-3, following footnote to this chapter.

369. Under 16 U.S.C. § 523 (1964); See Exhibit III-3 following footnotes to this chapter.
370. F. S. Handbook §§ 2751.52, 2752.61 (September 1958).
371. Id. § 2751.52 (September 1958).
372. Id. § 2751.58 (September 1958).
373. F.S. Manual § 2751.54 (December 1965).
374. 16 U.S.C. § 523 (1964); 16 U.S.C. § 533 (1964); 43 U.S.C. §§ 931c, d (1964); 49 U.S.C. §§ 1115(a), (b), (1964); 7 U.S.C. § 1011 (d) (1964).
375. F.S. Manual §§ 2752.2 (1), (2) (September 1958).
376. F.S. Handbook § 2752.2 (July 1960).
377. F.S. Manual § 2752.2 (3) (September 1958).
378. 16 U.S.C. § 551 (1964); 16 U.S.C. § 522 (1964); 16 U.S.C. § 432 (1964); 16 U.S.C. § 497 (1964); 16 U.S.C. § 580 (d) (1964); 43 U.S.C. §§ 931c, d (1964); 23 U.S.C. § 107d (1964); 23 U.S.C. § 317 (1964); and 48 U.S.C. § 341 (1964).
379. Including the uses authorized by 16 U.S.C. § 497 (1964), 48 U.S.C. § 341 (1964) and 16 U.S.C. § 580 (d) (1964), but excluding those uses otherwise specifically authorized by acts of Congress.
380. 36 C.F.R. § 251.1(a) (1) (1969).
381. F.S. Manual § 2720.3 (Amend. No. 15, January 1960).
382. Id. § 2710.11a (Amend. No. 12, October 1968).
383. Id. § 2710.11b (Amend. No. 12, October 1968).
384. Id. § 2711.1 (Amend. No. 12, October 1968).
385. Id. § 2714 (Amend. No. 12, October 1968).
386. Id. § 2716.3 (Amend. No. 12, October 1968).
387. Id. § 2711.1 (Amend. No. 12, October 1968).
388. Id. § 2711.2 (Amend. No. 12, October 1968).

- 389. Id. §2711.2 (Amend. No. 12, October 1968).
- 390. Id. § 2716.3 (Amend. No. 12, October 1968).
- 391. Id. § 2701.1 (12) (Amend. No. 12, October 1968).
- 392. Id. § 2710.3 (Amend. No. 12, October 1968).
- 393. Id. § 2712.1 (Amend. No. 12, October 1968).
- 394. See Exhibit III-4 following footnotes to this chapter.
- 395. F.S. Manual § 2712 (Amend. No. 12, October 1968), See
F.S. Manual Ch. 2720.
- 396. Id. § 2712.4 (Amend. No. 12, October 1968).
- 397. Id. § 2712.2 (Amend. No. 12, October 1968).
- 398. Id.
- 399. Id.
- 400. 36 C.F.R. § 251.2 (1969).
- 401. F.S. Manual § 2710.12a (Amend. No. 12, October 1968).
- 402. Id.
- 403. Id. § 2715 (Amend. No. 12, October 1968).
- 404. Id. §§ 2715.41, 2715.06 (1) (Amend No. 12, October 1968).
- 405. Id. §§ 2715.41f (1) (2) (Amend. No. 12, October 1968).
- 406. Id. § 2715.2 (Amend. No. 12, October 1968).
- 407. Id. § 2715.3 (Amend. No. 12, October 1968).
- 408. Id. § 2715.41a (Amend. No. 12, October 1968).
- 409. Id. § 2715.41f (Amend No. 12, October 1968).
- 410. Id. § 2715.41c (Amend No. 12, October 1968).
- 411. Id. § 2711.2 (Amend. No. 12, October 1968).

- 412. Id. § 2715.41h (Amend. No. 12, October 1968).
- 413. Id. § 2715.42 (Amend. No. 12, October 1968).
- 414. Id. § 2715.45 (Amend. No. 12, October 1968).
- 415. Id. § 2703 (Amend. No. 14, January 1969).
- 416. See Exhibit III-4, following footnotes to this chapter.
- 417. F.S. Manual §§ 2780, 2782.
- 418. 36 C.F.R. 251.1 (1969).
- 419. F.S. Manual § 2716.1 (Amend No. 12, October 1968).
- 420. Id.
- 421. Id.
- 422. Id. § 2716.2 (Amend. No. 12, October 1968).
- 423. Id. § 2716.3 (Amend. No. 12, October 1968).
- 424. Id. § 2716.4 (Amend. No. 12, October 1968).
- 425. Id. § 2711.2, (Amend. No. 12, October 1968).
- 426. See note 378 supra.
- 427. 43 U.S.C. § 387 (1964).
- 428. Reclamation Instructions § 215.4.1 (1957).
- 429. Id. § 215.4.2F (1957).
- 430. Id. § 215.4.2C (1957).
- 431. Id. § 215.4.2D (1957).
- 432. Id. § 215.4.4 (1957).
- 433. Id. § 215.4.2B (1957).

- 434. Id. § 215.5.2E (1959).
- 435. Id. § 215.5.6 (1959)
- 436. Id. § 215.5.2C (1959).
- 437. Id. § 215.5.3 (1959).
- 438. Id. § 215.5.8 (1959).
- 439. Id. § 215.5.2B (1959).
- 440. Id. § 215.5.16 (1962).
- 441. Id. § 215.5.17 (1962).
- 442. Id. § 215.5.18 (1962).
- 443. Id. § 215.6.1 (1957).
- 444. Id. § 215.6.2E (1957).
- 445. Id. § 215.6.2C (1957).
- 446. Id. § 215.6.11 (1957).
- 447. Id. § 215.6.2B (1957).
- 448. Id. § 215.6.4 (1957).
- 449. Id. § 215.6.5 (1957).
- 450. 43 U.S.C. § 387 (1964).
- 451. Reclamation Instructions §§ 215.7.1, 215.7.3 (1957).
- 452. Id. § 215.7.2E (1957).
- 453. Id. § 215.7.2C (1957).
- 454. Id. § 215.7.4 (1957).
- 455. Id. § 215.7.2B (1957).

EXHIBIT III-1

FORMS APPLICABLE TO
DISPOSAL OF SECTION 10 LANDS

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENTFORM APPROVED
BUDGET BUREAU NO. 42-R972.3

Land Office and Serial Number

SMALL TRACT APPLICATION AND LEASE

Act of June 1, 1938 (52 Stat. 609; 43 U.S.C. 682a-3), as amended

LEASE TERMS ON REVERSE

1. Name (first, middle initial, and last)

Address (include zip code)

HEREBY APPLIES to lease or purchase one tract of public land described in item 2, or any part thereof, which is classified as a single tract for disposal under the Small Tract Act and subject to all regulations of the Secretary of the Interior now or hereafter in force, when not inconsistent with any express and specific provision, herein which are made a part hereof.

2. Land Applied for			3. Small Tract Lease (Not to be filled in by lessee)		
Section	Township	Range	Section	Township	Range
Meridian	State		Meridian	State	
a. Legal subdivision or lot no.		Total acreage	Legal subdivision or lot no.		Total acreage
b. Is any other available tract included in the same classification order? ☐ Yes ☐ No			Above lands classified for ☐ Lease only ☐ Lease and sale		
4a. Did you personally make an on-the-ground inspection of the ☐ tract ☐ land within a one mile radius? ☐ Yes ☐ No			Purpose ☐ Residence ☐ Recreation ☐ Business ☐ Community		
b. Is the tract occupied? ☐ Yes ☐ No			Annual Rental \$		Purchase Price \$
c. Does the land contain improvements? ☐ Yes ☐ No			d. Are there indications of mining activity, such as monuments, stakes, or prospect holes? ☐ Yes ☐ No		

If the answer to 4b, c, or d, above, is "yes," explain

e. What is the land to be used for? ☐ Business ☐ Residence ☐ Recreation ☐ Community Site5a. Are you a citizen of the United States? ☐ Yes ☐ Nob. Are you an employee, the spouse of an employee, or an agent of an employee of the Department of the Interior?
☐ Yes ☐ No (If "yes," give name of employee and the Bureau in which employed)c. Have you, or any member of your family residing with you, previously filed any application under this act?
☐ Yes ☐ No (If "yes," explain)d. As applicant, are you a ☐ partnership ☐ association ☐ corporation ☐ individual (See 3d of the Specific Instructions)Have you attached the filing fee of \$16? ☐ Yes ☐ No Advance payment \$

(Signature of Applicant)

(Date)

(Title)

Title 18 U.S.C. Section 1001, makes it a crime for any person knowingly and willfully to make to any department or agency of the United States any false, fictitious, or fraudulent statements or representations as to any matter within its jurisdiction.

LEASE APPROVED

A lease for the land described in item 3 is hereby issued for a term of _____ years from the effective date thereof, subject to the provisions herein.

OPTION TO PURCHASE—If item 3 shows the land to be classified for lease and sale, lessee may purchase the tract whenever, within the lease period, he has made the improvements required herein and has fully complied with the terms and conditions of this lease, for the purchase price indicated in item 3.

THE UNITED STATES OF AMERICA

(Signature of Signing Officer)

Date lease effective:

(Signature of Manager)

LEASE TERMS

1. If the lands have been classified for lease only, this lease is not subject to renewal unless the lessee has constructed the improvements required by Item 2(a), below. If the lands have been classified for lease and sale, this lease is subject to renewal only upon a showing satisfactory to the lessor that the failure to meet the requirements for sale of the tract is justified and that nonrenewal of the lease would work an extreme hardship on the lessee. The lessee may apply for renewal of the lease, at any time prior to the expiration thereof, and, if it is determined that a new lease should be granted he will be accorded a privilege to a new lease, for such term and upon such conditions as may be fixed.

2. The lessee agrees:

(a) To construct upon the land during the term of the lease, or within the first 5 years if the lease period exceeds 5 years, the improvements specified in the order classifying the tract for small tract purposes. Plans may be submitted to the office which issued the lease for approval in advance of construction.

(b) To observe all Federal, state, county, and other laws, regulations, and ordinances which are applicable to the premises.

(c) To keep the premises in a neat and orderly condition.

(d) If the lease term exceeds 5 years, to pay the lessor, in advance on or before the anniversary date hereof, the annual rental specified in Item 3 on the reverse hereof.

(e) To conduct all business operations, if authorized by this lease, in an orderly manner and in accordance with all applicable Federal, state, county, and other laws, regulations, and ordinances.

(f) This lease is subject to the provisions of Executive Order No. 11246 of September 24, 1965, as amended, which sets forth the nondiscrimination clauses. A copy of this order may be obtained from the signing officer.

(g) Not to commit waste or injury to the land, or to utilize it for any purpose other than that for which this lease is issued.

(h) To take all reasonable precautions to prevent and suppress forest, brush, grass, and other fires that may result in damage and to extinguish all fires before leaving the premises unattended.

(i) Not to cut timber from the leased lands without written permission of the lessor. Cutting may be permitted by the authorized officer to clear the lands or make improvements thereon. Cut timber may not be sold.

(j) To take all precautions to prevent pollution of waters on and in the vicinity of this tract.

(k) Not to enclose or obstruct in any manner, or erect or maintain signs or buildings on any highways, roads, or trails commonly used for public travel. The leased land is subject to the easements for rights-of-way specified in the order classifying the land for small tract purposes. In the absence of any provisions for such easements in such classification order, the leased land is subject to easements for rights-of-way of 50 feet in width along the boundaries thereof, for street and road purposes and for public utilities. Any patent for the land will reserve the above-mentioned easements.

3. The United States reserves all of the coal, oil, gas, and other mineral deposits in the leased land together with the right to enter upon the land and prospect for, mine, and remove such minerals.

4. Nothing contained in this lease shall restrict the acquisition, granting, or use permits or rights-of-way.

5. Authorized representatives of the Department of the Interior shall have the right at any time to enter the leased premises for the purpose of inspection, and Federal agents and game wardens shall have the right at all times to enter the leased area on official business.

6. A relinquishment, upon acceptance by the signing officer, will be effective as of the date it is filed. A relinquishment will not be accepted where the lessee is in default under any of the terms or conditions of this lease.

7. This lease shall terminate automatically if the lessee fails to pay the rental on or before the anniversary due date thereof. However, default may be waived where payment is received within 30 days after written notice is given by the lessor.

8. This lease may be cancelled for failure of the lessee to perform or observe any of the terms or conditions hereof, or of the regulations issued under the act of June 1, 1938, as amended, where default continues for 30 days after written notice by the lessor.

9. Upon the termination, cancellation, or expiration of this lease, the lessee will be allowed 90 days to remove improvements from the land, or to make other disposition thereof. Upon his failure to do so, the improvements will become the property of the United States.

10. The lessee will not assign this lease without prior approval of the lessor and will not speculate in the privileges herein granted. Subleasing of this lease or any portion thereof is not permitted.

11. This lease shall be binding upon and inure to the benefit of the heirs, executors, administrators, successors, and assigns of the parties hereto.

12. No Member of, or Delegate to, the Congress, or Resident Commissioner, after his election or appointment, and either before or after he has qualified, and during his continuance in office, and no officer, agent, or employee of the Department of the Interior, except as otherwise provided in 43 CFR Part 7, shall be admitted to any share or part of this lease, or derive any benefit that may arise therefrom, and the provisions of Title 18, U.S.C., Sections 431-433, relating to contracts, enter into and form a part of this lease, so far as the same may be applicable.

13. This lease is issued subject to any existing valid rights, including valid mining claims.

REQUEST FOR APPRAISAL OF SMALL TRACT

Date: _____

Manager, Riverside District and Land Office
Bureau of Land Management
1414 University Avenue, Box 723
Riverside, California 92502

Dear Sir:

Please consider this as my request to have the following described land appraised and offered for sale under the Small Tract Act of June 1, 1938 at the weekly auction in your office.

1. Name and address of requestor:

2. Legal description of land to be appraised:

MD
T. ., R. ., SB Base and Meridian
section _____:

3. I desire to purchase this small tract for the following purpose:

4. Tracts presently on the market and available for immediate sale will not serve my purpose as outlined in 3 above because

5. I own the following described land which is adjacent to or near the land requested:

T. .., R. MD .., SB Base and Meridian
section _____ :

6. I am a citizen of the United States _____

I am an alien and have declared my intention of becoming a citizen of the United States _____

I am over the age of 21 _____
Yes No

7. I have (have not) acquired title to or an interest in lands under the Small Tract Act prior to this time. (If answer is affirmative, give description and extent of interest.) I am not an employee, the spouse of an employee, or an agent of an employee of the Department of the Interior.

8. The appraisal of only one tract may be requested, inasmuch as the small tract regulations state that only one tract may be purchased per person.

9. I understand that this request, if favorably considered, may take up to six months to accomplish. I also understand that the appraisal will be based on the current fair market value of the land.

10. I understand that you will notify me concerning your intended action on this request, and that if this requested appraisal is made and the land offered at auction, I will be notified in advance of the sale date.

11. I understand that the action I am asking you to take is discretionary with you and that the tendering of this request does not of itself gain for me any right, interest, or preference to this land.

Signature

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

FORM APPROVED
BUDGET BUREAU NO. 42-R14

Land Office and Serial Number

PUBLIC LAND SALE APPLICATION
Public Land Sale Act of September 19, 1964
(78 Stat. 988; 43 U.S.C. 1421-1427)

1. Name of Applicant (first, middle initial, and last)	Address (include zip code)
--	----------------------------

2. Give legal description of land applied for				
SUBDIVISIONS	SECTION	TOWNSHIP	RANGE	MERIDIAN

State of	County of	Containing
----------	-----------	------------

3. Have you attached the required Petition for Classification? (Form 2400-7) ☐ Yes ☐ No

4. Have you enclosed a nonrefundable service charge of \$25? ☐ Yes (See Specific Instruction No. 4)

5. Have you attached a statement designed to show that the lands are needed for the orderly growth and development of a community or are chiefly valuable for residential, commercial, agricultural (exclusive of lands chiefly valuable for grazing and raising forage crops), industrial, or public uses or development? ☐ Yes ☐ No

6. Have you attached information on the type of development contemplated, use to which the land is to be put, structures and other improvements which should be erected on the land, and approximate dates of need for development? ☐ Yes ☐ No

7. Have you attached a statement by local planning or governing officials showing the nature of the zoning regulations, if any, which are in effect? ☐ Yes ☐ No

8. If a governmental agency, have you filed a statement of your qualification to apply? ☐ Yes ☐ No

9a. If an individual, are you a citizen? ☐ Yes ☐ No If "no," have you declared your intention to become a citizen? ☐ Yes ☐ No

b. Are you twenty-one years of age or over? ☐ Yes ☐ No

10. If a partnership or association, is each of your members qualified as to citizenship? ☐ Yes ☐ No

11. If a corporation, are you authorized to hold title to real property? ☐ Yes ☐ No

I HEREBY CERTIFY That the statements made herein are true, complete, and correct to the best of my knowledge and belief, and are made in good faith.

(Signature of Applicant)

(Date) (Title)

Title 18 U.S.C. Section 1001, makes it a crime for any person knowingly and willfully to make to any department or agency of the United States any false, fictitious, or fraudulent statements or representations as to any matter within its jurisdiction.

GENERAL INSTRUCTIONS

1. Type or print plainly, in ink.
2. Submit this application and related documents to the proper land office for the state in which the land is located.
3. Complete blocks 1 through 7 and attach other required material.
4. Study the controlling regulations which are found in 43 CFR 2720.

SPECIFIC INSTRUCTIONS

Item 2 - Land description: If the land is surveyed, give complete legal description. If the land is unsurveyed, description should be by metes and bounds connected, if feasible, by course and distance with a corner of the public land survey. Where possible, the approximate legal subdivisions of unsurveyed lands should be stated. Acreage applied for must not exceed that specified by the regulations.

Item 3 - All applicants must complete this block. If the lands have been already classified for disposition under the Act, no petition is required.

Item 4 - Each application, except those filed by a qualified governmental agency, must be accompanied by a nonrefundable service charge of \$25. Enclose a check, money order, or bank draft made payable to the Bureau of Land Management.

Form 4-1267
(December 1959)UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENTFORM APPROVED
BUDGET BUREAU NO. 42-R1223

Land Office

Serial Number

APPLICATION FOR LAND FOR RECREATION
OR PUBLIC PURPOSES

1. Applicant

Mailing address

2. Legal description of the land applied for

Section _____, Township _____

Range _____ Meridian, State _____ Total no. of acres _____

3. We apply to ☐ lease the land described above for a period of _____ years or to ☐ purchase the land described above under the act of June 14, 1926 (44 Stat. 741), as amended by act of June 4, 1954 (68 Stat. 173; 43 U.S.C. 869), and the regulations thereunder (43 CFR 254).

4. We plan to use the land for the following purposes:

5. We are authorized to hold the land for these purposes by:

6. The land ☐ is ☐ is not used or occupied. Names and addresses of users or occupants; if any:

7. TO BE ANSWERED ONLY IF APPLICANT IS GOVERNMENT UNIT

The land ☐ is ☐ is not within our political boundaries.

Title 18 U.S.C. Sec. 1001, makes it a crime for any person knowingly and willfully to make to any department or agency of the United States any false, fictitious, or fraudulent statements or representations as to any matter within its jurisdiction.

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

PUBLIC SALE APPLICATION

Rev. Stat. 2455 (43 U.S.C. 1171)

Act of September 26, 1968 (43 U.S.C. 1431-1435)

FORM APPROVED
BUDGET BUREAU NO. 42-R977

Land Office and Serial Number

☐ Rev. Stat. 2455☐ Act of September 26, 1968

Name of applicant (first, middle initial, and last)

Address (include zip code)

Applicant makes application that the public land described below be ordered into market and sold at public auction

LEGAL SUBDIVISION

SECTION

TOWNSHIP

RANGE

MERIDIAN

County of

State of

Containing

acres

Describe physical features of the land applied for

Does the land contain timber? ☐ Yes ☐ No (If "yes," describe giving location, acreage, species)Are there any hot, medicinal, or other springs or waterholes on the land? ☐ Yes ☐ No (If "yes," give location, size, and estimate of daily capacity in gallons)Are there any indications of minerals of any kind, mining claims, or mineral activity on the lands? ☐ Yes ☐ No (If "yes," give location, kind of mineral, extent of activity)Are there any improvements such as fences, reservoirs, etc. on the land? ☐ Yes ☐ No (If "yes," give location, type of improvement, condition, and approximate value)

f. Is the land now being used by anyone? ☐ Yes ☐ No (If "yes," give names and addresses)

g. Has the land been used in the past? ☐ Yes ☐ No (If "yes," give names and addresses)

3a. Are you the sole owner of whole title in fee of land adjoining the land described in Item 1? ☐ Yes ☐ No
(See instruction number 1)

b. Are you the holder of a valid entry on land adjoining the land described in Item 1? ☐ Yes ☐ No

4a. Is the land applied for an isolated tract? ☐ Yes ☐ No (If "no," complete 4b)

b. Have you previously filed an application for any nonisolated lands, and purchased such lands, which together with the land covered by this application exceeds 760 acres? ☐ Yes ☐ No

5. Have you previously filed an application for land under the act of September 26, 1968, and purchased such lands which together with the land covered by this application exceeds 120 acres? ☐ Yes ☐ No

6a. Was the land described in Item 1 being used without authorization from the United States on or before September 26, 1968? ☐ Yes ☐ No (If "yes," complete 6b)

b. Did the user know the land belonged to the United States when the use was initiated? ☐ Yes ☐ No (If "yes," complete 6c)

c. Was the user of the land the owner or user of contiguous nonfederal lands? ☐ Yes ☐ No

7. Are you the sole owner of whole title in fee of land contiguous to the land described in Item 1? ☐ Yes ☐ No
(See instruction number 2)

8a. Have you enclosed a filing fee of \$25? ☐ Yes (Nonrefundable)

b. Have you enclosed a deposit of \$50 for cost of publication? ☐ Yes (See 43 CFR 2243.1-1b)

9. Have you attached the required Petition for Classification (Form 2400-7)? ☐ Yes ☐ No

I CERTIFY That the above statements, made by me in this application are true, complete, and correct to the best of my knowledge and belief and are made in good faith.

(Date)

(Signature of Applicant)

Title 18 U.S.C. Section 1001, makes it a crime for any person knowingly and willfully to make to any department or agency of the United States any false, fictitious, or fraudulent statements or representations as to any matter within its jurisdiction.

Title 18 U.S.C. Section 1860, makes it a crime to engage in unlawful combinations and intimidation of bidders.

8. We have made other applications under the act of June 4, 1954 (68 Stat. 173; 43 U.S.C. 869) as follows: (If any, give the name of the land office and serial number of each application; if none, write "none"):

9. I enclose the filing fee of \$10. ☐

10. I, the undersigned, submit this application on behalf of the applicant by virtue of the authority granted me by:

(Signature)

(Date)

(Title)

INSTRUCTIONS

1. This application must be prepared in *triplicate* and filed in the proper Land Office for the State in which the lands are located. Applications for lands in the following States which have no Land Office should be filed in the office indicated:

North Dakota, South Dakota

Land Office, BLM, Billings, Montana

Kansas, Nebraska

Land Office, BLM, Cheyenne, Wyoming

Oklahoma

Land Office, BLM, Santa Fe, New Mexico

Eastern States

Eastern States Office, BLM, Washington 25, D.C.

2. Type or print plainly in ink.

3. Attach to this application *three* copies of the statement required by 43 CFR 254.7.

4. *Land description:* If the land is surveyed, give complete legal description. If the land is unsurveyed, description should be by metes and bounds

connected, if feasible, by course and distance with a corner of the public land survey. Where possible the approximate legal subdivisions of unsurveyed lands should be stated. Acreage applied for must not exceed that specified by the regulations, if this is an application to purchase.

5. *Item 4:* Describe briefly the uses to which the lands will be put, citing the project name, if there is one.

6. *Item 5:* Cite the appropriate authority. Nonprofit corporations and associations must submit a certified copy of their articles of incorporation or association, or of other evidence of their authority.

7. *Item 8:* List the name of the Land Office and the serial number of each application made under the act, except applications which have been finally rejected.

8. *Item 9:* For the \$10 filing fee enclose check, money order, or bank draft made payable to the Bureau of Land Management.

9. *Item 10:* Cite the appropriate authority. If the signing individual is authorized to apply on behalf of the organization by minutes of a meeting or similar resolution, a copy of these must be presented with the application.

EXHIBIT III-2

STATUTES AUTHORIZING USE AND
OCCUPANCY OF SECTION 10 LANDS

Statute

16:432

Uses: Examination of ruins, excavation of archeological sites, gathering objects of antiquity; for benefit of reputable museums, universities, colleges, other recognized scientific or educational institutions; to increase knowledge of objects; objects must be permanently preserved in public museums if gathered.

Interests and Size: Permits; size not applicable.

Classes of Land: Lands under jurisdiction of Army, Agriculture, Interior, respectively.

Department: Army, Agriculture, Interior

Term: Not applicable.

Applicants and Preferences: Qualified institutions.

Charges: Not applicable.

Statute

16:497

Uses: Hotels, resorts and any other structures or facilities for recreation, public convenience or safety; summerhomes and stores; building, structures, and facilities for industrial or commercial purposes consistent with other uses; buildings, structures, facilities for education, public use, public activity.

Interests and Size: Use and occupancy; 80 acres except for summer homes and stores.

Classes of Land: National forests.

Department: Agriculture.

Term: 30 years.

Applicants and Preferences: State subdivision, public or non-profit agency for public use.

Charges: Not applicable.

Statute

16:522

Uses: Electrical plants, poles, lines; telephone and telegraph canals, ditches, pipes and pipelines, flumes, tunnels, or other water conduits; water plants, dams, and reservoirs used to promote irrigation, mining or quarrying, or manufacturing or cutting of timber or lumber, or supplying water for domestic, public, other uses.

Interests and Size: Permit use of rights of way; ground occupied plus 50 feet each side from margin, or 50 feet centerline of pipes and wires and poles; not a right, easement, or interest.

Classes of Land: National forests.

Department: Agriculture; approval of Chief Officer of department under whom supervision falls.

Term: Not applicable.

Applicants and Preferences: Any citizen, association or corporation of the United States.

Charges: Not applicable.

Statute

16:523

16:420

16:5

43:961

Uses: Electrical poles, lines; communication poles, lines; radio, television, other communication transmitting, relay, receiving structures and facilities.

Interests and Size: Easement for rights of way; 200 feet each side of centerline for lines and poles; 400 by 400 feet for radio, television, etc.

Classes of Land: National forests; National parks; military and other reservations; public lands.

Department: Head of department having jurisdiction over lands.

Term: 50 years.

Applicants and Preferences: Citizen, association or corporation.

Charges: Not applicable.

Statute Uses: Construction, maintenance of dams, reservoirs, water
16:524 plants, ditches, flumes, pipes, tunnels and canals for
municipal, mining, milling and ore reduction.

Interests and Size: Rights of way; size not applicable.

Classes of Land: National forests.

Department: Interior, BLM subject to clearance with agency
having jurisdiction.

Term: While beneficial use is made.

Applicants and Preferences: Citizens and corporations of the
United States.

Charges: Not applicable.

Statute Uses: Wagon road, railroad, other highway.

16:525 Interests and Size: Rights of way; size not applicable.

Classes of Land: National forest.

Department: Interior.

Term: Not applicable.

Applicants and Preferences: Not applicable.

Charges: Not applicable.

Statute Uses: Roads.

16:533 Interests and Size: Termanent or temporary easements;
size not applicable.

Classes of Land: National forests.

Department: Agriculture.

Term: Not applicable.

Applicants and Preferences: Not applicable.

Charges: Not applicable.

Statute Uses: Not applicable.
16:551 Interests and Size: Use and occupancy; size not applicable.
Classes of Land: Not applicable.
Department: Agriculture.
Term: Not applicable.
Applicants and Preferences: Not applicable.
Charges: Not applicable.

Statute Uses: Not applicable.
16:580d Interests and Size: Permit use; size not applicable.
Classes of Land: Structures and improvements under control of Forest Service and land used in connection.
Department: Agriculture.
Term: 30 years.
Applicants and Preferences: Public, private agencies, corporations, firms, associations, individuals.
Charges: Recondition and maintain structures.

Statute: Uses: Construction, reconstruction, or improvement of any
23:107d section of the Interstate System of Highways.
Interests and Size: Rights of way, including control of access; size not applicable.
Classes of Land: Lands or interests in lands owned by U.S.
Department: Secretary of Commerce; arrangements to be made with agency having jurisdiction over land.
Term: Not applicable.
Applicants and Preferences: State or other person.
Charges: Not applicable.

Statute Uses: Highways; construction and maintenance of highways.

23:317 Interests and Size: Right of way; right to take materials for so long as need exists; size not applicable.

Classes of Land: Lands or interests in lands owned by U. S. .

Department: Secretary of Commerce; Secretary of department administering land to determine that appropriation of land or material not contrary to public interest and to impose such conditions as he deems necessary.

Term: Not applicable.

Applicants and Preferences: State highway department or its nominee.

Charges: Not applicable.

Statute Uses: Pipeline purposes for the transportation of oil or natural gas.

30:181

Interests and Size: Right of way, to the extent of the ground occupied by pipeline and 25 feet on each side of same; forfeiture for failure to abide by conditions regarding transportation of oil or natural gas produced on government lands.

Classes of Land: Public lands, including the forest reserves of the U. S.

Department: Interior.

Term: Not applicable.

Applicants and Preferences: Citizen, association of citizens or corporation.

Charges: Not applicable.

Statute
43:931
c, d

Uses: Constructing and maintaining public buildings or other public works.

Interests and Size: Permits, leases, easements; interest to terminate if lands used for purpose other than that for which granted; size not applicable.

Classes of Land: Public lands and National forests, except National parks and monuments.

Department: Head of department or agency having jurisdiction over land.

Term: Period not to exceed 30 years.

Applicants and Preferences: States, counties, cities, towns, townships, municipal corporations and other public agencies.

Charges: Market value of interest, fixed through appraisal.

Statute
43:932

Uses: Construction of highways over public lands.

Interests and Size: Rights of way; size not applicable.

Classes of Land: Public lands not reserved for public use.

Department: Interior, BLM.

Term: Not applicable.

Applicants and Preferences: Not applicable.

Charges: Not applicable.

Statute
43:934
through
43:939

Uses: Construction of railroad; station buildings, depots, machine shops, side tracts, turnouts, and water stations.

Interests and Size: Rights of way, 100 feet on each side of the central line of railroad; right to take from adjacent lands material, earth, stone, and timber necessary for construction of railroad; ground adjacent to right of way, not more than 20 acres per station to extent of one station for each 10 miles or road.

Classes of Land: Public lands, except lands within the limits of any military, park, or Indian reservation or other lands reserved from sale.

Department: Interior.

Term: Not applicable.

Applicants and Preferences: Duly organized railroad company.

Charges: Not applicable.

Statute

43:946
through
43:949
43:951
43:664

Uses: Reservoirs, canals, laterals for irrigation or drainage purposes and for other, subsidiary public purposes (water transport, domestic use, or for development of power).

Interests and Size: Right of way for ground occupied by water of any reservoir, canals and laterals and 50 feet on each side of marginal limits thereof; such additional right of way as Secretary deems necessary for operation and maintenance of such works; right to take from adjacent land material, earth, and stone for construction of such works; if any section of canal or ditch uncompleted within 5 years after location, rights forfeited.

Classes of Land: Public lands and reservations of U. S.; reservoir sites reserved or to be reserved.

Department: Interior; granted by BLM subject to clearance with agency having jurisdiction.

Term: Not applicable.

Applicants and Preferences: Corporations, individuals, association of individuals; for reservoir sites, states to the same extent as individuals and corporations.

Charges: Charge for water coming in from such sites subject to control and regulation of states and territories in which sites located.

Statute

43:950

Uses: Erection of dwelling or other buildings or corrals for convenience of those engaged in care and management of the reservoir, canal or ditch.

Interests and Size: Permits, easements for not more than 5 acres of ground adjoining the right of way granted in 43:946.

Classes of Land: Public lands and reservations of U.S., except lands within National forests.

Department: Interior.

Term: Not applicable.

Applicants and Preferences: Not applicable.

Charges: Not applicable.

Statute

43:952

through

43:955

Uses: Furnishing water to livestock; protecting livestock, conserving water and preserving its quality and conditions.

Interests and Size: Right to construct reservoir and right to control reservoir site, not exceeding 160 acres; interest to revert if reservoir not maintained and water kept for purpose granted; permit to fence reservoir; reservoir to be open to free use of any person desiring to water animals of any kind.

Classes of Land: Unoccupied public lands, not mineral or otherwise reserved.

Department: Interior; issued by BLM.

Term: Not applicable.

Applicants and Preferences: Person, livestock company, or transportation corporation engaged in breeding, grazing, driving or transporting livestock.

Charges: Not applicable.

Statute Use: Tramroads, canals, or reservoirs.

43:956

Interests and Size: Right of way, to extent of ground occupied by the water of the canals and reservoirs and 50 feet on each side of the marginal limits thereof or 50 feet on each side of the centerline of the tramroad.

Classes of Land: Public lands not within limits of any National forest, park, military or Indian reservation.

Department: Interior; BLM, subject to clearance with agency having jurisdiction.

Term: Not applicable.

Applicants and Preferences: Citizen or association of citizens engaged in business of mining or quarrying or of cutting timber and manufacturing lumber for the purpose of furnishing water for domestic, public, and other beneficial uses.

Charges: Not applicable.

Statute Use: Wagon roads, railroad, or other highway.

43:958/

43:665

See

16:525

Interests and Size: Right of way.

Classes of Land: Reservoir sites.

Department: Interior.

Term: Not applicable.

Applicants and Preferences: Not applicable.

Charges: Not applicable.

Statute

43:959

Use: Electrical plants, poles and lines for generation and Distribution of power; telephone and telegraph purposes; canals, dtiches, pipes and pipelines, flumes, tunnels and other water conduits; and water plants, dams, and reservoirs used to promote irrigation, mining, quarrying, manufacturing or cutting of timber, or the supplying of water.

Interests and Size: Permit to use of rights of way to extent of ground occupied by such works and not to exceed 50 feet on each side of the marginal limits thereof or not to exceed 50 feet on each side of centerline of said pipe, lines, or poles.

Classes of Land: Public lands, forests, and other reservations of U. S., and the Yosemite and Sequoia National Parks, and the General Grant section of Kings Canyon National Park.

Department: Interior; permits allowed within parks or any forest, military, Indian or other reservation only upon approval of chief officer under whose supervision park or reservation falls.

Term: Not applicable.

Applicants and Preferences: Citizen, association, or corporation.

Charges: Not applicable.

Statute

43:961

See

16:523

16:420

16:5

Use: Electrical poles and lines for transmission and distribution of power and for communication purposes; radio, TV and other communication transmitting, relay and receiving structures and facilities.

Interests and Size: Easements for rights of way, to extent of 200 feet on each side of centerline of such poles and lines, and not to exceed 400 feet for transmitting, relay, and receiving structures and facilities; all or part of right may be forfeited for nonuse for a period of 2 years or for abandonment.

Classes of Land: Public lands and reservations of U. S.

Department: Head of department having jurisdiction; BLM for all agencies; right of way within or through Indian reservation must be approved by chief officer of department under whose supervision reservation falls, upon finding by him that grant of right of way not incompatible with public interest.

Term: Period not to exceed 50 years.

Applicants and Preferences: Citizen, association, corporation.

Changes: Not applicable.

Statute

49:1101

49:1115

Use: Airport development (any work involved in constructing, improving, or repairing a public airport; any acquisition of land or interest therein or easements through or other interest in airspace which is necessary to permit such work; but not the construction, alteration or repair of airport hangars).

Interests and Size: Such interest as Administrator of FAA deems necessary for carrying out a project for the accomplishment of airport development with respect to a particular airport; interest conveyed to revert if lands are not developed or cease to be used for airport purposes.

Classes of Land: Any lands owned or controlled by U.S.

Department: FAA, head of department or agency having control over land to determine that conveyance would not be inconsistent with the needs of the department or agency.

Term: Not applicable.

Applicants and Preferences: U.S. Government or an agency thereof; a state, Puerto Rico, the Virgin Islands, or an agency of any of them; a municipality or other political subdivision; a tax-supported institution.

Charges: Not applicable.

EXHIBIT III-3

FOREST SERVICE STIPULATIONS FOR GRANTING
CERTAIN RIGHTS-OF-WAY OVER NATIONAL FOREST LANDS

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SAMPLE

UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICE

RAILROAD STIPULATION

Uses _____

(Railroad)

(Name of applicant)

WHEREAS, The railroad right-of-way applied for the _____
_____ Company (hereinafter called the applicant) is
located within the _____ National Forest, as shown
by a certain tracing executed by _____, on _____,
19__, and filed in the United States land office at _____,
State of _____, on _____, 19__; and

WHEREAS, The regulations of the United States Department of the
Interior concerning rights-of-way for railroads (43 U.S.C., Part 243)
provide that whenever such a right-of-way is located within a national
forest, the applicant must enter into such stipulation and execute such
bond as the Forest Service may require for the protection of the
national forest; and

WHEREAS, The Forest Service requires for the protection of said
national forest that the applicant shall enter into the stipulation herein-
after set forth;

NOW, THEREFORE, In consideration of the approval of the right-
of way applied for, the applicant does hereby stipulate and agree, and
does bind itself, its successors, and assigns, as follows:

Article 1. The applicant, in exercising the privileges appurtenant
to said right-of-way across land of the United States within said national
forest, shall comply with the regulations of the Department of Agricul-
ture and with all Federal, State, county, and municipal laws, ordinances,
or regulations which are applicable to such right-of-way or to

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operations thereon and shall maintain such right-of-way and all improvements thereon in conformity with standards of repair, orderliness, neatness, sanitation, and safety acceptable to the forest officer in charge.

Article 2. The applicant shall pay the United States for any damages resulting from the use and occupation of its right-of-way within the exterior boundaries of the said national forest.

Article 3. During the time such right-of-way remains in force, the applicant shall both independently and in cooperation with the Forest Service do everything that is reasonable and practicable to prevent, control, and suppress forest fires on such right-of-way within the exterior boundaries of said national forest and in the immediate vicinity thereof, and shall include in the terms of employment of its employees, and in contracts for the use, maintenance, or improvement of said right-of-way, provisions requiring such employees and such contractors and their employees, respectively, to do likewise. The requirements imposed upon the applicant under this article shall include but not be limited to the following:

(1) To clear and keep clear of all dry grass, weeds, and brush, all standing or down dead trees and snags, and such other inflammable material as may be designated in writing by the forest officer in charge, on all of the right-of-way within the exterior boundaries of the said national forest, and for a distance of 200 feet on either side of the centerline of the said right-of-way across lands of the United States within said boundaries: Provided, no debris burning or burning of any kind shall be done or permitted by the applicant or its employees or by its contractors or their contractors or their employees within said boundaries or so near thereto that fire could spread to such national forest, without obtaining advance approval in writing from the forest officer in charge, prescribing the condition under which burning will be permitted.

(2) (a) Take immediate independent or cooperative action to control and extinguish any fire, regardless of cause, on or in the immediate vicinity of said right-of-way within the exterior boundaries of said national forest, or so near thereto that such fire could spread to said national forest; and (b), upon request and unless prevented by circumstances over which the applicant has no control, to place its employees, its contractors and their employees, and its equipment and that of its

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contractors at the disposal of any forest officer for the purpose of fighting forest fires: Provided, the provisions of this clause shall apply to section gangs, patrolmen, work train crews, and similar forces within 100 miles of any such fire, and shall not apply to train crews, dispatchers, and those essential to movement of trains, or to men or equipment more than 100 miles from such fire.

(3) The applicant shall bear costs, including reimbursement to the Forest Service for all direct costs incurred by the Forest Service in controlling and extinguishing (a) any fire on or threatening, in the judgment of the Forest Service, land of the United States within the exterior boundaries of said national forest or lands under the administration or protection of the Forest Service which is caused with or without negligence by the applicant, its employees, or its contractors or their employees; (b) any fire on or within the immediate vicinity of said right-of-way within the said national forest or so near thereto that it could spread to said forest, the origin or spread of which the applicant, its employees, or its contractors or their employees reasonably could have prevented; (c) any fire caused by reason of the use or occupation by the applicant, its employees, or its contractors or their employees of its right-of-way within or near the exterior boundaries of said national forest; and whenever any fire shall originate within 200 feet of the centerline of such right-of-way, within the exterior boundaries of said national forest or so near thereto that it could spread to said forest, it shall be conclusively presumed that such fire resulted from said use or occupation, unless the applicant shall show affirmatively that the fire was caused by other than itself, its employees, or its contractors or their employees. The computation of damages caused by fires shall include but not be limited to injury to Government improvements and chattels; injury to timber; injury to land, including but not limited to damage to brush, young growth, and other vegetation; suppression costs, including but not limited to expenses and wages of all persons engaged in suppression work, equipment, and supplies. Official records of the forest supervisor's office, certified to by the forest supervisor, will be accepted as evidence.

All direct costs incurred by the Forest Service will be paid by the applicant either by advance deposits into the cooperative work fund or by reimbursement where emergency conditions made such advance deposit impractical.

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Compliance with this article shall not relieve the applicant from any other liability.

(4) When employees of the applicant or its contractors are placed at the disposal of the Forest Service as stipulated in clause (2) (b) above, they shall become employees of the Forest Service and shall be paid for fire-fighting services at current rates of pay established by the Forest Service for the said national forest for services of similar character unless other rates have been approved by the Forest Service in a prior written agreement; and equipment furnished by the applicant or its contractors shall be paid for by the Forest Service at stipulated rates previously agreed to by both parties: Provided, the applicant or its contractors are not responsible for the suppression costs as stated above.

(5) The applicant shall comply, in a manner satisfactory to the forest officer in charge, with all applicable fire rules and with all fire instructions of such officer and shall require similar compliance by its employees and its contractors and their employees on or in the vicinity of said right-of-way within said national forest.

Article 4. To allow the Forest Service, without charge, to install and maintain telephone instruments in the railroad stations in said national forest, and to string its telephone wires upon the poles erected by the applicant along said right-of-way, for use only in the official business of the Forest Service; and to require train crews to notify station agents by the quickest practicable method of fires and of their direction and distance from the stations, and to require the station agents to notify the forest officers by the quickest available means of such fires.

Article 5. To adopt and put into effect such code or system of locomotive signals, for the purpose of notifying station agents of forest fires, as may be prescribed by the Forest Service in cooperation with the officials of railroad companies of the United States operating railroads in national forests.

Article 6. To hire, maintain, and equip under the supervision of the forest officer in charge an adequate fire patrol on the right-of-way across the said national forest during the fire season of each year, the duration of the said fire season and the adequacy of said patrol to be determined by said officer in accordance with the climatic conditions of each respective fire season. Standard, effective equipment to prevent

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the escape of fire from ash pans, fire boxes, or other parts of motive power used in the operation of the said railroad shall be satisfactory to the forest officer in charge. The fire patrol herein provided for its entirely separate and apart from the regular fire patrol maintained by the United States Forest Service and is intended to cover the extra fire hazard due to the presence of the applicant's railroad if and when the same shall be constructed.

Article 7. To permit forest officers to operate speeders upon the applicant's track during the dry season for the purpose only of patrolling the national-forest land adjacent to the railroad right-of-way and to permit forest officers on official business from the 1st day of June to the 31st day of October, inclusive, in each year, to ride on such engines and freight trains as may be available: Provided, that the applicant may require any forest officer before exercising the privilege granted in this section to execute a release from any liability for personal injuries in such form as shall be satisfactory to the applicant; and Provided further, that such permission will be granted only upon such track and upon such trains as the applicant may decide are safe and practicable for the purpose.

Article 8. To replace any Government telephone lines destroyed or damaged by construction work upon said right-of-way within said national forest.

Article 9. To build new roads and trails as required by the forest officer in charge to replace any forest roads or trails destroyed by construction work upon said right-of-way, and to build and maintain suitable crossings, as required by said officer, for all roads and trails which intersect the right-of-way, or for the passage of livestock, such crossings to be protected by suitable cattleguards, and to repair fully all damage, other than ordinary wear and tear, to other roads and trails in said national forest caused by the applicant in the exercise of the privileges appurtenant to said right-of-way across said national forest.

Article 10. To erect and maintain a good and sufficient fence on either or both sides of such right-of-way, wherever the applicant's railroad passes through or along any range owned or administered by the Forest Service and allotted for the grazing of livestock in said national forest, which in the judgment of the Forest Service requires

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the maintenance of a fence for the protection of such livestock from passing trains.

Article 11. To permit the occupancy and use by the United States, its grantees, permittees, or lessees, without charge and without the consent of the railroad, of any part of such right-of-way across land of the United States within the exterior boundaries of said national forest not actually occupied by the railroad or appurtenant facilities, and to permit free and unrestricted access in, through, and across said right-of-way for officers and employees of the United States in the performance of their official duties and for authorized users of national-forest land and purchasers of national forest products, when not inconsistent with the enjoyment of said right-of-way by the applicant, its successors, and assigns,

Article 12. The applicant shall protect the scenic and esthetic values on or adjacent to its right-of-way across lands of the United States within such national forest as far as possible, consistent with the authorized use, at all times during the construction, operation, and maintenance of the project and project works.

Article 13. The applicant shall indemnify the United States against any liability for damage to life or property arising from the occupancy or use of land of the United States within the exterior boundaries of said national forest by the applicant, its employees, or its contractors or their employees: Provided, this shall not be construed to indemnify the United States against its own negligence.

Article 14. To pay the United States, in accordance with the scale or estimate of forest officers, for all timber cut, damaged, killed, or destroyed on national-forest lands, in the exercise of privileges appurtenant to such right-of-way, which, in the opinion of the forest officer in charge, has a value commonly recognized in the locality concerned, at a rate to be fixed by him, which shall correspond to the prevailing rates on the said forest: Provided, that if, in the judgement of the forest officer in charge, any of the timber so cut, damaged, killed, or destroyed does not have a value commonly recognized in the locality, payment will be required for only such portion thereof as is used by the applicant, at a rate to be fixed by the said officer, which shall be equivalent to the estimated costs of examination and administration; to bank or deck, for disposal by the United States, at places designated by the forest officer in charge, any such timber not used by the applicant.

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Article 15. The applicant shall require its employees, and its contractors and their employees to comply with all applicable provisions of this stipulation.

Article 16. In case of change of address, the applicant shall immediately notify the Forest Service.

Article 17. Upon the abandonment, termination, or forfeiture of such right-of-way, and in the absence of an agreement to the contrary, the applicant will remove within 1 year all structures and facilities which it has placed or caused to be placed on lands of the United States within the exterior boundaries of said national forest, and upon failure to remove any such structures and facilities within that period they shall become the property of the United States.

Article 18. The applicant shall make no assignment or transfer of such right-of-way across lands of the United States within the exterior boundaries of said national forest except on condition that the assignees or transferees, jointly and severally, have covenanted in writing to fulfill and perform all duties and obligations of the applicant arising hereunder.

IN WITNESS WHEREOF, said applicant has caused these presents to be executed and its corporate seal to be hereunto affixed at

_____ on this _____ day of _____
19____.

(Corporate seal)

Attest:

Secretary

By _____

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STIPULATIONS FOR TELEPHONE AND TELEGRAPH LINE EASEMENTS

(Act of March 4, 1911, as amended May 27, 1952)

The _____ hereinafter called the grantee, in consideration of the granting of an easement pursuant to the act of March 4, 1911, as amended (66 Stat. 95; 16 U.S.C. 523, Supp. V), for a telephone and telegraph line right-of-way, within the _____ National Forest, State of _____, and as shown by a map executed by the grantee on the _____ day of _____, 19____, hereby stipulates and agrees and does bind itself as follows:

1. That said right-of-way is limited to width of 40 feet, 20 feet on each side of the centerline.
2. To abide by all the rules and regulations of the Secretary of Agriculture relating to grant of telephone and telegraph line rights-of-way under the act of March 4, 1911, as amended, and the provisions of that certain agreement entered into between the Secretary of Agriculture and the grantee on _____, 19____.
3. To pay to the Forest Service, U.S. Department of Agriculture, _____, the sum of _____ dollars (\$_____) for the period to June 30, 19____, and thereafter on July 1, annually in advance, _____ dollars (\$_____): Provided, however, that the charges for this use may be readjusted whenever necessary to place this easement on a basis consistent with the charges to other users for like privileges and, provided further, that a general readjustment will be made _____* years subsequent to the June 30 above stated and at the end of each 5-year period thereafter.
4. To protect all other telephone, telegraph, and power transmission lines now or heretofore constructed and all Government telephone, telegraph, and power transmission lines at the crossing of and at all places of proximity to the grantee's telephone and telegraph lines, in a workmanlike manner, according to the usual standards of safety for construction, operation, and maintenance in such cases, and to maintain

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its telephone and telegraph lines in such manner as not to menace life or property.

5. To indemnify the United States against any liability for damage to life or property arising from the occupancy or use of national-forest lands under this grant, provided this shall not be construed to indemnify the United States against its own negligence.

6. To repair fully all damage, other than ordinary wear and tear, to roads and trails in the national forest caused by the grantee in the exercise of this grant.

7. To exercise diligence in protecting from damage the land and property of the United States covered by and used in connection with this grant, and to pay the United States for any damage resulting from negligence or from the violation of the terms of this grant or of any law or regulation applicable to the national forests by the grantee, or by any agents or employees of the grantee acting within the scope of their agency or employment.

8. To pay the United States for timber on lands of the United States cut, used, or destroyed in construction and maintenance of the telephone and telegraph line or in clearing of said lands and to dispose of all slash and debris resulting from the cutting or destruction of such timber in accordance with the requirements of the Forest Service. Payment for merchantable timber will be at current stumpage rates which are applicable to the sale of similar timber, and for young-growth timber below merchantable size payment will be at current damage appraisal values: Provided, that the grantee may be required to bank or deck for disposal by the Forest Service at places designated by the Forest Service any such timber not used by the grantee. Stumpage payment shall not be required of the grantee for timber cut by the grantee and sold or disposed of by the Forest Service to third parties. The Forest Service may sell or otherwise dispose of merchantable timber to others than the grantee when such timber can be felled and removed without undue interference with the operations of the grantee.

9. To clear the right-of-way hereby granted to the extent necessary for its operation, and where individual circumstances require, with the prior approval of the forest supervisor, to remove on or adjacent to the right-of-way all dead snags and all trees leaning toward the line

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which are deemed hazardous or might fall in contact with the line; Provided, that this clause shall not operate to extend the right-of-way beyond the limit specified in Clause 1 hereof.

10. To dispose of all slash, refuse, or unused timber accumulating on national-forest lands in the exercise of this grant, at such times and in such manner as may be required by the forest supervisor.

11. To do everything reasonable within its power, both independently and on request of forest officers, to prevent or suppress fires on or near the lands covered by this grant.

12. To provide, whenever requested by the forest supervisor, a way across the land covered by this grant for the free ingress or egress of forest officers and for users of national-forest land and purchasers of national forest products.

13. To maintain the improvements and premises to standards of repair, orderliness, neatness, sanitation, and safety acceptable to the forest officer in charge.

14. That this easement is subject to all valid claims.

15. That this grant confers no rights upon the grantee to use the right-of-way for purposes other than for the constructing, maintaining and operating a telephone and telegraph line thereon, except as otherwise specifically stated herein.

16. To protect the scenic and esthetic values of the right-of-way and the adjacent lands as far as possible consistent with the authorized use, during construction, operation, and maintenance of the lines.

17. To operate continuously its lines on the area covered by this grant unless, upon a full and satisfactory showing before the Chief, Forest Service, that such continuous operation is prevented by unavoidable accident or contingency, this requirement is temporarily waived by the said Chief.

18. To require, in the exercise of this grant, of its contractors or subcontractors compliance with all applicable conditions of this grant and of the above-mentioned agreement with the Secretary of Agriculture.

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19. That upon the abandonment, termination, or forfeiture of this grant, and in the absence of an agreement to the contrary, grantee will remove within 1 year all structures and facilities which have been placed on national-forest lands in the exercise of this grant; Provided, that upon failure to remove the structures within that period they shall become the property of the United States.

20. To make no assignment or transfer of said right-of-way except on condition that the assignees or transferees, jointly and severally, have covenanted in writing to fulfill and perform all the duties and obligations of the grantee arising hereunder, including its obligations under this clause.

21. In exercising the privileges herein granted to comply with the regulations of the Department of Agriculture and all Federal, State, county, and municipal laws, ordinances, or regulations which are applicable to the area or operations covered by this grant.

IN WITNESS WHEREOF, the grantee has executed this stipulation on the _____ day of _____, 19____.

(Corporate Seal)

Attest:

_____ By _____

(Title) (Title)

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Exhibit 1

UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICE

EASEMENT FOR RIGHT-OF-WAY
FOR RADIO-ELECTRONIC SITES (RADIO, TELEVISION
AND OTHER FORMS OF COMMUNICATION TRANSMITTING,
RELAY, AND RECEIVING STRUCTURES AND FACILITIES)

(Act of March 4, 1911 (36 Stat. 1253) as amended May 27, 1952
(66 Stat. 95; 16 U.S.C. * * * 523))

(Name of Grantee)

Pursuant to the provisions of the act of March 4, 1911, as
amended May 27, 1952 (16 U.S.C. * * * 523), I, _____,
Chief of the Forest Service (hereinafter referred to as the Chief,
hereby grant to _____ (Name of Grantee) _____ (hereinafter referred
to as the Grantee), an easement for right-of-way for the construction,
operation, and maintenance of radio-electronic type equipment for
(Type of use)

as hereinafter described and located upon lands of the United States
within _____ National Forest, in the
State of _____, subject to the rules and
regulations of the Secretary of Agriculture and to the conditions, pro-
visions, and requirements set forth hereinafter and in the act.

In consideration of the granting of this easement and the benefits
and advantages accruing hereunder to the Grantee, the Grantee hereby
stipulates and agrees and binds itself as follows:

Article 1. This easement is granted for a period of 25 years
from the date hereof. The right of the Grantee and its transferees and
successors to use or occupy the lands covered by this grant, for the
purpose of maintaining the project works or otherwise, may be renewed

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for a like period upon such terms and conditions and pursuant to such laws and regulations as may then be in effect covering like uses.

Article 2. The project covered by and subject to this grant consists of the site, not in excess of four hundred feet by four hundred feet, and all structures, equipment, or facilities located there, used or useful in the operation and maintenance of the said (Type of use stated above) , located within (Subsection, section, township, range, and principal meridian) National Forest, being acres, more or less, which site and project works are more specifically shown and described on a plat being marked exhibit 1, dated and attached hereto, and form *-2700-10, -* dated and attached hereto, said plat, form, and other exhibits described below being specifically made a part hereof (Describe other exhibits)

Article 3. The map and specifications designated as exhibits in article 2 hereof are made a part of this grant, and no substantial change or alteration in the design, location, or construction of the installation, including antenna systems, or investment in the project or project works, or changes in, or additions to, the specified operating frequencies, types emission, band widths, RF power outputs, class of service or the named licensee, shall hereafter be made until such change shall have been approved by the Chief or his duly designated representative: Provided, however, that if the Grantee deems it necessary or desirable that said exhibits or any of them be changed or the capital investment in the project be increased, there shall be submitted for the approval of the Chief or his duly designated representative, corrected, amended, supplemental, or additional exhibits covering the proposed changes or a revised investment statement properly sworn to and attested which upon approval shall become a part of this grant and shall supersede, in whole or in part, such exhibits theretofore made a part of this grant, as may be specified by the Chief or his duly designated representative.

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Article 4. The Grantee, in exercising the privileges of this grant, shall comply with the regulations of the Department of Agriculture and all Federal, State, county, and municipal laws, ordinances, or regulations which are applicable to the site or operations covered by this grant.

-Article 5. The Grantee- shall maintain the improvements and premises to standards of repair, orderliness, neatness, sanitation, and safety acceptable to the forest officer in charge.

Article *-6-* The Grantee shall pay to the Forest Service, U.S. Department of Agriculture, _____, the sum of _____ dollars (\$ _____) for the period to December 31, 19____, and thereafter on January 1, annually in advance _____ dollars (\$ _____): Provided, however, that the charges for this use may be readjusted whenever necessary to place this grant on a basis consistent with charges to other users for like privileges; and, provided further, that a general readjustment will be made *-as of, and effective on, -* January 1, _____, and at five-year intervals thereafter.

Article *-7.-* This grant confers no rights upon the Grantee to use this site for purposes other than for constructing, maintaining, and operating a _____ (Type of use authorized by grant), except as otherwise specifically stated herein.

Article *-8.-* The books and records of the Grantee, insofar as they contain information reflecting the investment in the project and project works covered by this grant, shall be open at all times to the inspection and examination of the Chief or other officer or agency of the United States duly authorized to make such inspection and examination.

Article *-9.-* The Grantee shall begin the construction of the aforesaid project or project works within _____ (days, months) from the date hereof, shall thereafter prosecute such construction in good faith and with due diligence, and shall complete the same and begin operation within _____ (days, months) from the date hereof. The periods specified for the beginning and completion of construction will be extended only on the written approval of

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the Chief or his duly designated representative, after a showing by the Grantee satisfactory to said officer that such beginning or completion of construction has been prevented by difficulties that could not reasonably have been foreseen or by other special and peculiar cause beyond the control of the Grantee.

Article *-10. -* During the time this grant remains in force the Grantee shall both independently and in cooperation with the Forest Service do everything that is reasonable and practicable to prevent, control and suppress forest fires on the area covered by this grant and in its immediate vicinity and shall include in the terms of employment of his employees and in contracts and subcontracts for the performance of any part of this grant provisions requiring employees, contractors and subcontractors, or employees of contractors and subcontractors, respectively, to do likewise. The requirements imposed upon the Grantee, his contractors and subcontractors, and the employees of either, under this section shall include but not be limited to:

- (1) Take immediate independent or cooperative action to control and extinguish any fire, regardless of cause, on the area covered by the grant or in its vicinity with all the manpower and facilities which the Grantee has at his immediate disposal on the area.
- (2) Upon request and unless prevented by circumstances over which the Grantee has no control to place his employees, contractors and subcontractors and employees of contractors or subcontractors and equipment at the disposal of any authorized forest officer for the purpose of fighting forest fires: Provided, that except in serious fire emergencies, as determined by the Forest Service, the Grantee and his contractors and subcontractors shall not be required to place more than _____ percent of their men and equipment at the disposal of any authorized forest officer for fighting fires outside the grant area or its immediate vicinity; and Provided further, that any employee or equipment furnished shall be relieved from fire fighting on such outside areas as soon as it is practicable for the Forest Service to obtain labor or equipment adequate for the control of the fire.

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- (3) The Grantee shall bear the costs, including reimbursement to the Forest Service for all direct costs incurred by the Forest Service in controlling and extinguishing (a) any fire, on or threatening, in the judgment of the Forest Service, National-Forest lands or lands under the administration or protection of the Forest Service which the Grantee, his employees, contractors and subcontractors, or employees of contractors and subcontractors caused with or without negligence in connection with operations under this grant; (b) any fire on the area covered by this grant or in its vicinity, the origin or spread of which the Grantee, his employees, contractors and subcontractors and employees of contractors and subcontractors reasonably could have prevented.

Payment for all direct costs incurred by the Forest Service will be made by the Grantee either by advance deposits into the cooperative work fund or by reimbursement where emergency conditions make such advance deposits impractical.

Compliance with this section shall not relieve Grantee from liability to the United States except for the cost of fire control.

- (4) When employees of the Grantee or his contractors and subcontractors are placed at the disposal of the Forest Service as stipulated in clause (2) above, they shall become employees of the Forest Service and shall be paid for fire fighting services at current rates of pay established by the Forest Service for the said National Forest for services of similar character unless other rates have been approved by the Forest Service in a prior written agreement, and equipment furnished by the Grantee or his contractors and subcontractors shall be paid for by the Forest Service at stipulated rates previously agreed to by both parties, provided the Grantee or his contractors and subcontractors are not responsible for the suppression costs as stated above.
- (5) The Grantee shall comply with, in a manner satisfactory to the Forest Service, and shall require that his employees, contractors and subcontractors, if any, and employees of contractors and subcontractors engaged in the performance of any part of this grant shall comply with the fire rules and instructions prescribed by the Forest Supervisor of the _____ National Forest.

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No debris burning on the site or burning of any kind will be done or permitted by the Grantee, his employees, contractors and subcontractors or employees of contractors and subcontractors at any time unless advance approval in writing prescribing the conditions under which burning will be permitted is obtained from the forest officer in charge.

Article *-11. -* There is specifically reserved the right of free and unrestricted access in, through, and across the land covered by this grant for officers and employees of the United States in the performance of their official duties and for users of National-Forest land and purchasers of National Forest products when not inconsistent with the exercise of the privileges herein granted.

Article *-12. -* The Grantee shall protect the scenic and esthetic values of the site and the adjacent lands as far as possible consistent with the authorized use at all times during the construction, operation, and maintenance of the project and project works.

Article *-13. -* The Grantee shall indemnify the United States against any liability for damage to life or property arising from the occupancy or use of National-Forest lands under this grant, provided this shall not be construed to indemnify the United States against its own negligence.

Article *-14. -* The Grantee shall exercise diligence in protecting from damage the land and property of the United States covered by and used in connection with this grant, and shall pay the United States for any damage resulting from negligence or from the violation of the terms of this grant or of any law or regulation applicable to the National Forests by the Grantee, his employees, subcontractors or their employees acting within the scope of their agency or employment.^{1/}

^{1/} For the clause to be inserted in grants to REA cooperatives or State, counties, municipalities, semipublic or nonprofit organizations, or where high hazards are involved, see FSH 2713.

(This footnote is not to be inserted in an easement.)

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Article *-15.-* The Grantee shall clear the site hereby granted to the extent necessary for its operation, and where individual circumstances require, with the prior approval of the Forest Supervisor, will remove on or adjacent to the site all * * * snags and all trees which are deemed hazardous to the project herein authorized; Provided That this clause shall not operate to extend the grant beyond the limit specified in article 2 hereof.

Article *-16.-* The Grantee shall pay the United States for timber on lands of the United States cut, used, or destroyed in construction and maintenance of the *-project and project works-* or in clearing of said lands and *-shall-* dispose of all slash and debris resulting from the cutting or destruction of such timber in accordance with the requirements of the Forest Service. Payment for merchantable timber will be at current stumpage rates which are applicable to the sale of similar timber, and for young-growth timber below merchantable size payment will be at current damage appraisal values; Provided, That the grantee may be required to bank or deck for disposal by the Forest Service at places designated by the Forest Service any such timber not used by the Grantee.- Stumpage payment shall not be required of the Grantee for timber cut by the grantee and sold or disposed of by the Forest Service to third parties. The Forest Service may sell or otherwise dispose of merchantable timber to others than the Grantee when such timber can be felled and removed without undue interference with the operations of the Grantee.

Article 17. The Grantee shall operate each radio-electronic type installation covered by this grant only in conformity with the requirements of the Federal Communications Commission *-2/-* and upon the use of specific radio frequencies, types emission, band widths, RF power outputs, and under specific radio or electronic service classification as authorized by the Federal Communications Commission.
-2/-

2/ *-In agreements with other Government agencies, substitute "Interdepartment Radio Advisory Committee" for "Federal Communications Commission."-*

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Article 18. The radio-electronic type installation operations covered by this grant shall be so conducted that interference is not caused to Forest Service radio-electronic type operations or to other U. S. Government radio communications presently operating on National Forest land on or adjacent to the location described in this grant. In case such interference with adjoining operations on National-Forest land results from the operations covered in this grant and corrective measures to eliminate or acceptably modify it are not effected, such failure will constitute a breach of conditions of this grant and be grounds for the termination of the grant by the Chief, Forest Service. In event the installation operations authorized under this grant cause interference to the operations of U. S. Government stations located on or adjacent to the easement site, the Grantee, and specifically the radio station licensee/s, will be responsible and will assume the cost of all corrective measures needed to eliminate or modify to an acceptable degree the interference problem. None of the provisions of this article are intended to relieve the Grantee from any responsibility or requirement which may be imposed by any other lawful authority for avoiding or eliminating electronic interference. *-3/-*

Article 19. The Forest Service reserves the right to allow a U. S. Government radio type station/s to use the site jointly with the Grantee, and to authorize joint use by such Government station/s of the roads and the power, telephone, and other auxiliary utility service lines installed and operated by the Grantee and of the housing and antenna towers or masts when such use will not jeopardize the Grantee's operations, but not including the Grantee's transmitting and receiving equipment, upon payment of a just and equitable proportion of the costs of operation and maintenance; provided that such joint use or occupancy will conform to recognized sound engineering practices. *-4/-*

-3/- The words "radio-electronic type installation operations," "radio-electronic type operations," or "radio communications" as used in article *-18-* and the words "radio type station or stations" as used in articles * * * 19 and 20 shall mean, respectively any and all forms of wireless communication and any and all forms of wireless communication transmitting, relay, and receiving facilities. (This footnote is to be inserted in an easement.)

*-4/ See footnote 3/

*-Amended April 1962
Amendment No. 52

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Article 20. The Forest Service reserves the right to authorize joint use by another radio type station or stations of the site, together with the roads and the power, telephone, and other auxiliary utility service lines installed and operated by the Grantee, upon payment by such user to the Grantee of a just and equitable proportion of the costs of installation, maintenance, and operation; provided that such joint use will conform to sound engineering practices. *-5/-*

Article 21. The Grantee shall not install or allow the installation within the structures or on the premises authorized and covered by this grant of any radio-electronic type equipment or installation which may be authorized by Federal Communications Commission license or Interdepartment Radio Advisory Committee frequency assignment for the use of or in the name of someone other than the Grantee without advance notification and joint-occupancy approval of the Forest Supervisor, _____ National Forest.

Article 22. All electrical wiring will, at a minimum adhere to the safety rules for the installation and maintenance of electric supply and communications lines as prescribed by the National Electric Safety Code.* All antenna systems shall have effective lightning protection earth grounds. All equipment racks and cabinets shall have effective lightning protection earth grounds.

Article 23. All radio-electronic type equipment, including associated cables, wiring, auxiliary equipment, and antenna systems, shall be installed and maintained in a clean, neat, orderly, and permanent manner and all such installations shall be both electrically and mechanically sound.

Article 24. All radio-electronic type transmitting and receiving equipment shall be mounted in enclosed metal cabinets or standard racks with effective RF protective metal shieldings covering the basic units and including all receivers, transmitters, and power supplies.

*-5/ See footnote 3/

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Article *-25. -* In respect to the regulation by any competent public authority of the service to be rendered by the Grantee or of the price to be charged therefor, and in respect to any purchase or taking over of the properties or business of the Grantee, or any part thereof, by the United States or by any State within which such properties are situated or business carried on in whole or in part, or by any municipal corporation of such State, no value whatsoever shall at any time be assigned to or claimed for the easement, or for the occupancy or use of National-Forest lands granted thereunder, nor shall the approval of such occupancy and use ever be estimated or considered as property upon which the Grantee shall be entitled to earn or receive any return, income, price, or compensation whatsoever.

Article *-26. -* The Grantee shall operate the project covered by this grant continuously unless, upon a full and satisfactory showing before the Chief, Forest Service, that such continuous operation is prevented by unavoidable accident or contingency or by order of the Federal Communications Commission, this requirement is temporarily waived by the said Chief.

Article *-27. -* The Grantee shall require, in the exercise of this grant, his employees, contractors and subcontractors and their employees to comply with all applicable conditions of this grant and the regulations of the Secretary of Agriculture.

Article *-28. -* In case of change of address, the Grantee shall immediately notify the Forest Supervisor.

Article *-29. -* If the Grantee shall cause or suffer essential project property to be removed or destroyed or to become unfit for use, without replacement, or shall abandon or discontinue good faith operation of the project for a period of more than two years, or refuse or neglect to comply with the terms of the easement and the regulations, the Chief will deem it to be the intent of the Grantee to surrender the easement, and after thirty days' written notice may, in his discretion, declare the easement forfeited or annulled.

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Article *-30. -* Upon the abandonment, termination, or forfeiture of this grant, and in the absence of an agreement to the contrary, Grantee will remove within one year all structures and facilities which have been placed on National-Forest lands in the exercise of this grant and upon failure to remove the structures within that period they shall become the property of the United States: *-Provided, That will not relieve the Grantee of liability for the cost of their removal and the restoration of the site. -*

Article *-31. -* The Grantee shall make no assignment or transfer of this right-of-way grant except on condition that the assignees or transferees, jointly and severally, have covenanted in writing to fulfill and perform all duties and obligations of the Grantee arising hereunder; Provided, however, That no assignment or transfer will be recognized without full compliance with the requirements of the Federal Communications Commission regarding the transfer of license or permit to operate the project and project works.

Article *-32. -* No Member of * * * Congress, or Resident Commissioner, shall be admitted to any share or part of this grant or to any benefit that may arise herefrom unless it is made with a corporation for its general benefit.

In witness whereof, I hereunto set my hand this _____
day of _____, 19__.

Chief of the Forest Service

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In Testimony of Acceptance of all the provisions and conditions of the act of March 4, 1911, as amended May 27, 1952, and the regulations thereunder, and the further conditions imposed in this grant, the Grantee, this _____ day of _____, 19____, has caused its corporate name to be signed hereto by _____, its _____ President, and its corporate seal to be affixed hereto and attested by _____, the _____ Secretary, pursuant to a resolution of its board of directors duly adopted on the _____ day of _____, 19____, a certified copy of the record of which is attached hereto. 3/

Grantee

By _____
Title

(SEAL)

Attest:

Secretary

3/ In the case of an individual, substitute the following:

I hereby accept and agree to all of the applicable provisions and conditions of the act of March 4, 1911, as amended May 27, 1952, and the regulations thereunder, and the further conditions imposed in this grant.

In witness whereof I hereunto set my hand this _____ day of _____, 19____.

Grantee

EXHIBIT III-4

APPLICATIONS FOR PERMITS
FOR USE OF SECTION 10 LANDS

CHAPTER 3.4 SPECIAL LAND-USE PERMITS

ILLUSTRATION 1

Form 4-972
(April 1968)UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENTSPECIAL LAND-USE APPLICATION AND PERMIT
(See Instructions on reverse)FORM APPROVED
BUDGET BUREAU NO. 42-R706.1

Office _____

Serial Number _____

1. Name (First name, middle initial, & last name): _____

Post Office address: _____

2a. I hereby apply for a special land-use permit for the public lands described as follows:

Section _____, Township _____, Range _____, Meridian, State of _____

b. I desire a permit for a period of _____ years (not to exceed five years).

c. The public lands are adjacent to a highway
☐ Yes ☐ No If yes, complete the following:
Type of highway: ☐ Federal ☐ State ☐ City.
Highway No. _____d. The public lands are _____ miles from

(Nearest city or town)3a. I am at least 21 years of age ☐ Yes ☐ Nob. I am a citizen of the United States ☐ Yes ☐ Noc. I am not a citizen but have filed the necessary declaration of intention ☐ Yes ☐ Nod. The applicant is a ☐ partnership ☐ association ☐ corporation and the statements required by Instruction No. 2 are attached4. I have examined the lands described above ☐ Yes ☐ No If yes, give date(s): _____5a. The lands are now improved, occupied, or used
☐ Yes ☐ No If yes, describe improvements and purposes, and identify users and occupants.b. There are springs or water holes on the lands
☐ Yes ☐ No If yes, give particulars: _____

c. Proposed source of water for domestic or other use _____

d. The lands contain minerals ☐ Yes ☐ No
If yes, specify: _____e. The lands contain timber ☐ Yes ☐ No If yes, list species and volume of timber: _____

6a. I propose to use the lands for the following purposes: _____

b. I intend to make the following improvements on the lands.
(Describe improvements and attach drawings, if convenient): _____

c. Estimated cost of proposed improvements: _____

d. Proposed sanitation facilities: _____

\$ _____

7. I make this application for my own use and benefit, except as follows (If there are no exceptions, write "None"):

I declare that the statements made by me in this application are true, complete, and correct to the best of my knowledge and are made in good faith.

(Signature of applicant)

To be used in lieu of Forms 4-972a, b, and c.

SPECIAL LAND-USE PERMIT

Permission is hereby granted to _____

of _____

to use the following-described lands:

Section _____, Township _____, Range _____, Meridian, State of _____
for the purpose of _____

_____ and subject to the following conditions:

- (1) This permit is issued for the period from _____, 19 ____ to _____, 19 ____, and is revocable for any breach of the conditions hereof. It is also revocable at the discretion of the authorized officer of the Bureau of Land Management, at any time, upon notice, if in his judgment the lands should be devoted to another use. The permit is subject to valid adverse claims heretofore or hereafter acquired.
- (2) The permittee shall pay annually, in advance, to the signing officer as rental the sum of _____ dollars, or such other sum as may be required if an adjustment of rental is made.
- (3) The permittee shall observe all Federal, State, and local laws and regulations applicable to the premises, and to the erection or maintenance of signs or advertising displays, including the regulations for the protection of game birds and game animals, and shall keep the premises in a neat, orderly, and sanitary condition.
- (4) The use or occupancy of the land under this permit shall commence within _____ months from the date hereof and shall be exercised at least _____ days each year.
- (5) The permittee shall take all reasonable precautions to prevent and suppress forest, brush, and grass fires, and to prevent the pollution of waters on or in the vicinity of the lands.
- (6) Authorized representatives of the Department of the Interior and other Federal agencies, and game wardens shall at all times have the right to enter the premises on official business.
- (7) The permittee shall not enclose roads or trails commonly in public use.
- (8) The permittee shall pay the United States for any damage to its property resulting from this use.
- (9) The permittee shall immediately notify the signing officer of a change of address.
- (10) This permit is subject to all of the applicable provisions of the regulations (43 CFR, Part 256) which are made a part hereof.
- (11) The permittee agrees to have the serial number of this permit marked or painted on each advertising display erected or maintained under the authority of such permit.
- (12) The permittee shall not cut any timber on the lands without prior permission of the signing officer.
- (13) Special stipulations:

(Authorized Officer)

(Date)

(Title)

INSTRUCTIONS

1. This application may be submitted to any local office of the Bureau of Land Management having jurisdiction over the lands. It must be submitted in *duplicate*.
2. An application by a partnership or association must be accompanied by a statement by each member that he is a citizen of the United States or has filed a declaration to become a citizen. An application by a corporation must be accompanied by a statement showing that the corporation is authorized to hold land in the State or Territory in which the land is located and that the person making the application is authorized to act for the corporation.
3. This application must be accompanied by a filing fee of \$10 except if the applicant is a Federal, State, or local governmental agency. Checks must be made payable to the Bureau of Land Management.
4. If this application is for permission to erect an advertising display or sign, the applicant must: (a) attach an accurate and fully descriptive diagram, sketch, or photograph (at least 3" x 5") of the sign or display to be erected showing the dimensions, type of construction, estimated cost, the advertising material to be included thereon, the plan of illumination, if any, and the manner of attachment to the land; and, (b) a photograph (at least 3" x 5") showing the site on which the sign or display is to be erected.

a. Record no. (1-2)

b. Region (3-4)

c. Forest (5-6)

70

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SPECIAL USE PERMIT

d. District (7-8)

e. Use number (9-12)

f. Kind of use (13-14)

Act of June 4, 1897

This permit is revocable and nontransferable
(Ref. FSM 2710)

g. State (16-17)

h. County (18-20)

k. Card no. (21)

--

Permission is hereby granted to _____
of _____
hereinafter called the permittee, to use subject to the conditions set out below, the following described
or improvements:

This permit covers _____ acres and/or _____ miles and is issued for the purpose of _____

1. Construction or occupancy and use under this permit shall begin within _____ months, and construction, if any, shall be completed within _____ months, from the date of the permit. The use shall be actually exercised at least _____ days each year, unless otherwise authorized in writing.

2. In consideration for this use, the permittee shall pay to the Forest Service, U.S. Department of Agriculture, the sum of _____ Dollars (\$) for the period from _____ 19____, to _____, 19____, and thereafter annually on _____

Dollars (\$ _____)

Provided, however, Charges for this use may be made or readjusted whenever necessary to place the charges on a basis commensurate with the value of use authorized by this permit.

3. This permit is accepted subject to the conditions set forth herein, and to conditions _____ attached hereto and made a part of this permit.

PERMITTEE	NAME OF PERMITTEE	SIGNATURE OF AUTHORIZED OFFICER	DATE
		TITLE	
ISSUING OFFICER	NAME AND SIGNATURE	TITLE	DATE

4. Development plans; layout plans; construction, reconstruction, or alteration of improvements; or revision of layout or construction plans for this area must be approved in advance and in writing by the forest supervisor. Trees or shrubbery on the permitted area may be removed or destroyed only after the forest officer in charge has approved, and has marked or otherwise designated that which may be removed or destroyed. Timber cut or destroyed will be paid for by the permittee as follows: Merchantable timber at appraised value; young-growth timber below merchantable size at current damage appraisal value; *provided* that the Forest Service reserves the right to dispose of the merchantable timber to others than the permittee at no stumpage cost to the permittee. Trees, shrubs, and other plants may be planted in such manner and in such places about the premises as may be approved by the forest officer in charge.

5. The permittee shall maintain the improvements and premises to standards of repair, orderliness, neatness, sanitation, and safety acceptable to the forest officer in charge.

6. This permit is subject to all valid claims.

7. The permittee, in exercising the privileges granted by this permit, shall comply with the regulations of the Department of Agriculture and all Federal, State, county, and municipal laws, ordinances, or regulations which are applicable to the area or operations covered by this permit.

8. The permittee shall take all reasonable precautions to prevent and suppress forest fires. No material shall be disposed of by burning in open fires during the closed season established by law or regulation without a written permit from the forest officer in charge or his authorized agent.

9. The permittee shall exercise diligence in protecting from damage the land and property of the United States covered by and used in connection with this permit, and shall pay the United States for any damage resulting from negligence or from the violation of the terms of this permit or of any law or regulation applicable to the national forests by the permittee, or by any agents or employees of the permittee acting within the scope of their agency or employment.

10. The permittee shall fully repair all damage, other than ordinary wear and tear, to national forest roads and trails caused by the permittee in the exercise of the privilege granted by this permit.

11. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this agreement or to any benefit that may arise herefrom unless it is made with a corporation for its general benefit.

12. Upon abandonment, termination, revocation, or cancellation of this permit, the permittee shall remove within a reasonable time all structures and improvements except those owned by the United States, and shall restore the site, unless otherwise agreed upon in writing or in this permit. If the permittee fails to remove all such structures or improvements within a reasonable period, they shall become the property of the United States, but that will not relieve the permittee of liability for the cost of their removal and restoration of the site.

13. This permit is not transferable. If the permittee through voluntary sale or transfer, or through enforcement of contract, foreclosure, tax sale, or other valid legal proceeding shall cease to be the owner of the physical improvements other than those owned by the United States situated on the land described in this permit and is unable to furnish adequate proof of ability to redeem or otherwise reestablish title to said improvements, this permit shall be subject to cancellation. But if the person to whom title to said improvements shall have been transferred in either manner provided is qualified as a permittee and is willing that his future occupancy of the premises shall be subject to such new conditions and stipulations as existing or prospective circumstances may warrant, his continued occupancy of the premises may be authorized by permit to him if, in the opinion of the issuing officer or his successor, issuance of a permit is desirable and in the public interest.

14. In case of change of address, the permittee shall immediately notify the forest supervisor.

15. The temporary use and occupancy of the premises and improvements herein described may be sublet by the permittee to third parties only with the prior written approval of the forest supervisor but the permittee shall continue to be responsible for compliance with all conditions of this permit by persons to whom such premises may be sublet.

16. This permit may be terminated upon breach of any of the conditions herein or at the discretion of the regional forester or the Chief, Forest Service.

17. In the event of any conflict between any of the preceding printed clauses or any provisions thereof and any of the following clauses or any provisions thereof, the following clauses will control.

TERM SPECIAL USE PERMIT

Act of March 4, 1915, as amended July 28, 1956,
or Act of March 30, 1948
(Ref. FSM 2710)

a. Record no. (1-2) 70	b. Region (3-4) ----	c. Forest (5-6)
d. District (7-8) ---	e. Use number (9-12) -----	f. Kind of use (13-15)
g. State (16-17) --	h. County (18-20) -----	k. Card no. (21)

Permission is hereby granted to _____

of _____
hereinafter called the permittee, to use subject to the conditions set out below, the following described
lands or improvements for the period of _____ years from the date thereof:

This permit covers _____ acres and is issued for the purpose of:

1. Construction or occupancy and use under this permit shall begin within _____ month, and
construction, if any, shall be completed within _____ months, from the date of the permit. The
use shall be actually exercised at least _____ days each year, unless otherwise authorized
in writing.

2. In consideration for this use, the permittee shall pay to the Forest Service, U.S. Department of Agriculture, the sum of _____ Dollars (\$) for the period from _____
19____, to _____, 19____, and thereafter
annually on _____ Dollars (\$_____)

Provided, however, That the charges for this use shall be readjusted as of, and effective on, the beginning
of each 5-year period from the due date of the first annual payment in order to place the charges on a basis
commensurate with the value of use authorized by this permit.

3. This permit is accepted subject to the conditions set forth herein, and to conditions _____
attached hereto and made a part of this permit.

PERMITTEE	NAME OF PERMITTEE	SIGNATURE OF AUTHORIZED OFFICER	DATE
		TITLE	
ISSUING OFFICER	NAME AND SIGNATURE	TITLE	DATE

4. Development plans; lay-out plans; construction, reconstruction, or alteration of improvements; or revision of lay-out or construction plans for this area must be approved in advance and in writing by the forest supervisor. Trees or shrubbery on the permitted area may be removed or destroyed only after the forest officer in charge has approved, and has marked or otherwise designated that which may be removed or destroyed. Timber cut or destroyed will be paid for by the permittee as follows: Merchantable timber at appraised value; young-growth timber below merchantable value at current damage appraisal value; provided that the Forest Service reserves the right to dispose of the merchantable timber to others than the permittee at no stumpage cost to the permittee. Trees, shrubs, and other plants may be planted in such manner and in such places about the premises as may be approved by the forest officer in charge.

5. The permittee shall maintain the improvements and premises to standards of repair, orderliness, neatness, sanitation, and safety acceptable to the forest officer in charge.

6. This permit is subject to all valid claims.

7. The permittee, in exercising the privileges granted by this permit, shall comply with the regulations of the Department of Agriculture and all Federal, State, county, and municipal laws, ordinances, or regulations which are applicable to the area or operations covered by this permit.

8. The permittee shall take all reasonable precaution to prevent and suppress forest fires. No material shall be disposed of by burning in open fires during the closed season established by law or regulation without a written permit from the forest officer in charge or his authorized agent.

9. The permittee shall exercise diligence in protecting from damage the land and property of the United States covered by and used in connection with this permit, and shall pay the United States for any damage resulting from negligence or from the violation of the terms of this permit or of any law or regulation applicable to the national forests by the permittee, or by any agents or employees of the permittee acting within the scope of their agency or employment.

10. The permittee shall fully repair all damage, other than ordinary wear and tear, to national forest roads and trails caused by the permittee in the exercise of the privilege granted by this permit.

11. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this agreement or to any benefit that may arise herefrom unless it is made with a corporation for its general benefit.

12. Except as provided in Clause 16 below, upon abandonment, termination, revocation, or cancellation of this permit, the permittee shall remove within a reasonable time all structures and improvements except those owned by the United States, and shall restore the site, unless otherwise agreed upon in writing or in this permit. If the permittee fails to remove all such structures or improvements within a reasonable period, they shall become the property of the United States, but that will not relieve the permittee of liability for the cost of their removal and the restoration of the site.

13. This permit is not transferable. If the permittee through voluntary sale or transfer, or through enforcement of contract, foreclosure, tax sale, or other valid legal proceeding shall cease to be the owner of the physical improvements other than those owned by the United States situated on the land described in this permit and is unable to furnish adequate proof of ability to redeem or otherwise reestablish title to said improvements, this permit shall be subject to cancellation. But if the person to whom title to said improvements shall have been transferred in either manner above provided is qualified as a permittee, and is willing that his future occupancy of the premises shall be subject to such new conditions and stipulations as existing or prospective circumstances may warrant, his continued occupancy of the premises will be authorized by a permit to him, which may be for the unexpired term of this permit or for such new period as the circumstances justify.

14. The permittee may sublease the use of land and improvements covered under this permit and the operation of concessions and facilities authorized; Provided the express written permission of the Forest Supervisor has been secured. The permittee shall continue to be responsible for compliance with all conditions of this permit by persons to whom such premises may be sublet.

15. This permit may be terminated upon breach of any of the conditions herein.

16. If during the term of this permit or any extension thereof, the Secretary of Agriculture or any official of the Forest Service acting by or under his authority shall determine that the public interest requires termination of this permit, this permit shall terminate upon thirty days' written notice to the permittee of such determination, and the United States shall have the right thereupon to purchase the permittee's improvements, to remove them, or to require the permittee to remove them, at the option of the United States, and the United States shall be obligated to pay an equitable consideration for the improvements or for removal of the improvements and damages to the improvements resulting from their removal. The amount of the consideration shall be fixed by mutual agreement between the United States and the permittee and shall be accepted by the permittee in full satisfaction of all claims against the United States under this clause: *Provided*, That if mutual agreement is not reached, the Forest Service shall determine the amount and if the permittee is dissatisfied with the amount thus determined to be due him he may appeal the determination in accordance with the Appeal Regulation (36 C.F.R. 211.20 - 211.37) and the amount as determined on appeal shall be final and conclusive on the parties hereto; *Provided further*, That upon the payment to the permittee of 75% of the amount fixed by the Forest Service, the right of the United States to remove or require the removal of the improvements shall not be stayed pending final decision on appeal.

17. The permittee agrees that the amount which the United States shall be required to pay for improvements in accordance with Clause 16 shall in no event exceed \$_____, and that this instrument may be introduced in any judicial proceedings for the acquisition of such improvements by the United States as the stipulation of the permittee and the United States with regard to the maximum amount which the United States shall be required to pay for the taking thereof.

18. In case of change of address the permittee shall immediately notify the forest supervisor.

19. In the event of any conflict between any of the preceding printed clauses or any provision thereof and any of the following clauses or any provisions thereof, the following clauses will control.

APPLICATION FOR PERMIT FOR TELEPHONE LINE ATTACHMENTS

In accordance with the agreement between the Secretary of Agriculture and _____ Company, dated _____

Application is hereby made for a permit to use the following described facilities: _____

(Name or Description of Line)

located in the State of _____, Forest Region No. _____
in or near _____ National Forest, and operating out of or
near _____ Exchange, or Toll Station, for the purpose of making
the following attachments, subject to the conditions set forth on the reverse
side hereof:

Purpose for which to be used: _____

Number of Attachments Per Pole	Kind of Attachments	Pin Nos.	Gain Nos.	* Pole Nos. (Incl.)		Total Number Poles	Total Number Attachments
				From	To		

When poles are not numbered, or where otherwise necessary to provide adequate description of use, show below or by separate drawing attached, a diagram of attachments, or a sketch of that portion of line to be occupied, including relationship to cultural and natural features and, where possible, the legal subdivisions involved.

The planned date for completing the installation of the above attachments, if permit is granted, is _____

Permit or contract to be superseded _____

(Date of Application)

Company approvals _____

By _____

Title _____

PERMIT FOR TELEPHONE LINE ATTACHMENTS

Permit or Contract

No. _____

Permission as applied for on the reverse side hereof is granted to _____

subject to the following conditions:

1. The payment of \$_____ annually, for all attachments in place on June 30 of each year at the following rates:

Kind of Attachments	Total No. Attachments	Rate Per Attachment	Total Charge

2. This permit may be terminated upon (30) days written notice, when continued use of the facilities is no longer desired by the permittee, when such use is forbidden by municipal or other authorities or by property owners, when the permittee fails to comply with any of the conditions hereof, or when the space occupied by the attachments is required by the owner of the basic facilities. Upon such termination the permittee shall discontinue all related use and remove its attachments at its own expense.
3. The permittee, at its own expense, shall perform all construction work and maintain its attachments in good order and repair in accordance with the facility owner's standard specifications and engineering practices.
4. The permittee shall construct, maintain and operate its circuits, including any extensions thereof, free from undue exposure to electrical contact with or inductive interference from any electrical circuit, and in a manner that will not interfere with the proper operation of the facility owner's circuits.
5. The permittee, at its own expense, shall change or discontinue the operation of its circuits to the extent required to eliminate interference with the facility owner's circuits, and shall repair, change, alter, improve or renew its attachments, whenever any such action becomes necessary in the judgment of the owner of the basic facilities.
6. The permittee shall not at any time make any changes in the location of its attachments to or in the use of the basic facilities without the written consent of the owner of such facilities.
7. This permit is subject to all valid claims of third parties and nothing herein contained shall be construed to confer upon the permittee any rights or property in the basic facilities.

This permit supersedes permit or contract _____

Company Approvals

By _____

Title _____

Date Approved _____

Work Completed _____
(Date)

TELEPHONE AND TELEGRAPH LINE RIGHT-OF-WAY

SPECIAL USE PERMIT

(Act of June 4, 1897, or July 22, 1937)

THIS PERMIT IS REVOCABLE

REGION	STATE	NAME OF PERMITTEE	DATE OF PERMIT
		KIND OF USE TELEPHONE AND TELEGRAPH LINE RIGHT-OF-WAY	PERMIT OR LINE NO.
		FOREST OR GRASSLAND	DISTRICT

Permission is hereby granted to _____ of _____, hereinafter called the permittee, to use the following described lands within the _____ National Forest/Grassland, State of _____, as more specifically shown on plats on file in the office of the forest supervisor at _____, as a right-of-way for the purpose of constructing and maintaining thereon a telephone and telegraph line:

Name of Line	Location (Section, Township, Range, Meridian)	Length - Miles (more or less)
--------------	--	----------------------------------

Total: miles _____; acres _____

This permission is subject to the following conditions, non-compliance with which will make this permit subject to revocation:

1. This permit is subject to *the provisions of the agreement made _____, between the permittee and the Secretary of Agriculture and to* all applicable rules and regulations of the Secretary of Agriculture governing the national forests, national grasslands, or other lands of the United States included in this permit.
2. This permit is limited to _____ feet _____ feet on each side of the center line.
3. This permit confers no rights upon the permittee to use the right-of-way for purposes other than for the constructing, maintaining, and operating a telephone and telegraph line thereon, except as otherwise specifically stated herein; nor to permit any use of any nature whatsoever by third parties except by and with the consent of the United States.
4. This permit is subject to all valid claims.
5. This permit may be transferred with the prior written approval of the officer by whom it was given or his successor, subject to such conditions as may be imposed at the time of transfer. It may be terminated upon breach of any of the conditions herein or at the discretion of the Regional Forester or Chief, Forest Service.
6. The permittee shall pay to the Forest Service, U.S. Department of Agriculture, the sum of _____ dollars (\$ _____) for the period from _____ 19____, to _____ 19____, and thereafter annually on _____ Dollars (\$ _____): *Provided, however, charges for this use may be made or readjusted whenever necessary to place the charges on a basis commensurate with the value of use authorized by this permit, and, **Provided further**, a general readjustment will be made as of, and effective on, ** (the beginning of each 5-year period from the due date of the first annual payment) (the beginning of the nearest 5-year anniversary date of the agreement between the Secretary of Agriculture and the permittee, falling after the first annual payment hereunder). ***
7. The permittee shall protect all other telephone, telegraph, and power transmission lines now or heretofore constructed and all Government telephone, telegraph, and power transmission lines at the crossing of and at all places of proximity to the permittee's telephone and telegraph lines, in a workmanlike manner, according to the usual standards of safety for construction, operation, and maintenance in such cases, and shall maintain its telephone and telegraph lines in such manner as not to menace life or property.

*Delete unless with a company having a general agreement.

**Delete inapplicable provision.

8. The permittee shall indemnify the United States against any liability for damage to life or property arising from the occupancy or use of national-forest lands, national grasslands, or any other lands of the United States under this permit, *Provided* this shall not be construed to indemnify the United States against its own negligence.
9. The permittee shall exercise diligence in protecting from damage the land and property of the United States covered by and used in connection with this permit, and shall pay the United States for any damage resulting from negligence or from the violation of the terms of this permit or of any law or regulation applicable to such land or property by the permittee, or by any agents or employees of the permittee acting within the scope of their agency or employment.
10. The permittee shall repair fully all damage, other than ordinary wear and tear, to roads and trails in the national forests, national grasslands, or any other lands of the United States, caused by the permittee in the exercise of the privileges granted by this permit.
11. The permittee shall pay the United States for timber on lands of the United States cut, used, or destroyed in construction and maintenance of the telephone and telegraph line or in clearing of said lands, and shall dispose of all slash, refuse, or unused timber resulting from the cutting or destruction of such timber, at such times and in such manner as may be required by the forest supervisor. Payment for merchantable timber will be at current stumpage rates which are applicable to the sale of similar timber, and for young-growth timber below merchantable size, payment will be at current damage appraisal values; *Provided*, That the permittee may be required to bank or deck for disposal by the Forest Service at places designated by the forest supervisor any such timber not used by the permittee. Stumpage payment shall not be required of the permittee for timber cut by the permittee and sold or disposed of by the Forest Service to third parties. The Forest Service may sell or otherwise dispose of merchantable timber to others than the permittee when such timber can be felled and removed without undue interference with the operations of the permittee.
12. The permittee is authorized to clear the right-of-way hereby granted to the extent necessary for its operation, and where individual circumstances require, with the prior approval of the forest supervisor, may remove on or adjacent to the right-of-way all snags and trees which might fall in contact with the line; *Provided*, That this clause shall not operate to extend the right-of-way beyond the limit specified in clause 2 hereof.
13. The permittee shall do everything reasonable within its power, both independently and on request of forest officers, to prevent and suppress fires on or near the lands covered by this permit, including preparation and placing in effect by the permittee of a fire control plan approved by the forest supervisor.
14. The permittee shall protect the scenic and aesthetic values of the right-of-way and the adjacent land as far as possible consistent with the authorized use, during construction, operation, and maintenance of the lines.
15. The permittee shall provide, whenever requested by the forest supervisor, a way across the land covered by this permit for the free ingress or egress of forest officers and for users of national forest, national grassland, or other land administered by the Forest Service, and purchasers of the products thereof.
16. The permittee shall maintain normal service over its line on the area covered by this permit unless, upon a full and satisfactory showing before the forest supervisor that such normal operation is prevented by unavoidable accident or contingency, this requirement is temporarily waived by the said forest supervisor.
17. The permittee shall maintain the improvements and premises to standards of repair, orderliness, neatness, sanitation, and safety acceptable to the forest officer in charge.
18. The permittee, in exercising the privileges granted by this permit, shall comply with all Federal and State laws, ordinances, or regulations which are applicable to the area or operations covered by this permit.
19. The permittee, in the exercise of the privileges granted by this permit, shall require of its contractors and subcontractors compliance with all applicable conditions of this permit and of the above-mentioned agreement with the Secretary of Agriculture.
20. The permittee, upon the abandonment, termination, or revocation of this permit, and in the absence of an agreement to the contrary, shall remove within one year all structures and facilities which have been placed on lands of the United States in the exercise of this permit; *Provided*, That upon failure to remove the structures and facilities within that period they shall become the property of the United States, but that will not relieve the permittee of liability for the cost of their removal and restoration of the site.

21. This permit shall have no force or effect until the permittee has signified acceptance thereof by signing and returning the duplicate copy to the forest supervisor.
22. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this permit or to any benefit that may arise herefrom, but this provision shall not be construed to extend to this permit if made with a corporation for its general benefit.

DATE	SIGNATURE OF ISSUING OFFICER	TITLE

This permit is accepted subject to the conditions set out above.

DATE	NAME OF PERMITTEE	SIGNATURE OF AUTHORIZED OFFICER
		TITLE

U.S. DEPARTMENT OF AGRICULTURE FOREST SERVICE SPECIAL USE PERMIT FOR ELECTRIC TRANSMISSION LINE Act of February 15, 1901 This permit is revocable and nontransferable	a. Record No. (1-2)	b. Region (3-4)	c. Forest (5-6)
	d. District (7-8)	e. Use Number (9-12)	f. Kind of use (13-15)
	g. State (16-17)	h. County (18-20)	k. Card no. (21)

_____ of _____
 (Name)

(hereafter called the permittee) is hereby authorized to use National Forest lands, for the construction, operation and maintenance of a _____ KV transmission line within the _____
 (Capacity) _____ National Forest, subject to the general provisions and to the special provisions and requirements, items _____ to _____ on page(s) _____ to _____ attached hereto and made a part of this permit. The location of this use is shown on the map(s) which is (are) a part of this permit.

Location: Beginning: _____
 (Sec.) (Twp.) (Range) (PM) (Lat.) (Long.)
 Ending: _____
 (Sec.) (Twp.) (Range) (PM) (Lat.) (Long.)
 Length in: _____ (Miles) or _____ x Width _____
 (Feet) (Feet) = _____ (Acres)

Construction or occupancy under this permit shall begin within _____ and construction shall be completed within _____ months.
 (Months) (Number)

For this use, the permittee shall pay to the Forest Service, U.S. Department of Agriculture, the sum of _____ Dollars (\$ _____) from _____ 19____, to _____ 19____, and thereafter, annually on _____ Dollars (\$ _____):

provided, however, charges for this use may be made or readjusted whenever necessary to place the charges on a basis commensurate with the value of the use authorized by this permit.

This permit is accepted subject to all of its terms and conditions:

ACCEPTED	PERMITTEE'S NAME & SIGNATURE		DATE
	ISSUING OFFICER'S NAME & SIGNATURE		DATE
APPROVED	TITLE		DATE

GENERAL PROVISIONS

1. Development plans; layout plans; construction, reconstruction, or alteration of improvements; or revision of layout construction plans for this area must be approved in advance and in writing by the Forest Supervisor.

2. No timber shall be cut or destroyed during construction of the transmission line without first obtaining permission from the Forest Service. The permittee shall clear only the minimum area required for safe transmission line use. All timber cut, destroyed or injured shall be paid for at current stumpage rates applicable to the sale by the Forest Service of similar timber in the National Forest.

3. The permittee shall keep the area beneath the transmission line cleared and shall trim all branches in contact or near contact with the line. All trees, live or dead, deemed by the permittee to be hazardous or which might fall in contact with the line, whether on or adjacent to the right-of-way, shall be removed by the permittee: Provided, however, that permission to do so must first be obtained from the Forest Service.

4. All waste material from constructing or maintaining the line shall be burned or otherwise disposed of as directed by the Forest Service. However, no material shall be disposed of by burning during any closed season established by law or regulation without a written permit from the Forest Service.

5. The permittee shall protect the scenic and esthetic values of the right-of-way and the adjacent land as far as possible consistent with the authorized use, during the construction, operation, and maintenance of the facility.

6. The permittee shall be responsible for prevention and control of soil erosion and gully on Government lands covered by this permit and lands adjacent thereto resulting from construction or maintenance of the transmission line; and all vegetate with grass or herbaceous plants all ground where the soil has been exposed; and shall construct and maintain such preventive works to accomplish this result as prescribed in the erosion control plan attached, and made a part of this permit.

7. The permittee shall place and maintain suitable structures and devices to reduce to a reasonable degree the possibility of contact between its powerline and telegraph, telephone, signal or other powerlines heretofore constructed and not owned by the permittee, and shall also place and maintain suitable structures and devices to reduce to a reasonable degree the possibility of any structures or wires falling and obstructing traffic or endangering life on highways or roads. The transmission line shall be designed and constructed in accordance with accepted standards (National Electrical Safety Code) and specifications for transmission lines of similar voltage, capacity, and purpose.

8. The permittee shall make provision, or bear the reasonable cost of making provision for avoiding inductive or conductive interference between any transmission facility or other works constructed, operated, or maintained by it and authorized under the permit, and any radio installation, telephone line, or other communication facilities existing when the permit is authorized or any such installation, line or facility thereafter constructed or operated by the United States or any agency thereof. This provision shall not relieve the permittee from any responsibility or requirement which may be imposed by other lawful authority for avoiding or eliminating inductive or conductive interference.

9. The permittee shall protect all Government and other telephone, telegraph, and power-transmission lines at crossings and at all places in proximity to the permittee's power-transmission line or lines; and shall maintain said power-transmission line or lines in such a manner as not to menace life or property.

10. The permittee shall maintain the improvements and premises to standards of repair, orderliness, neatness, sanitation, and safety acceptable to the Forest Service.

11. The permittee, in exercising the privileges granted by this permit, shall comply with the regulations of the Department

of Agriculture and all Federal, State, county, and municipal laws, ordinances, or regulations which are applicable to the area or operations covered by this permit.

12. The permittee shall do everything reasonably within its power and shall require its employees, contractors, and employees of contractors to do everything reasonably within their power, both independently and upon request of the Forest Service to prevent and suppress fires on or near the lands to be occupied under this permit.

13. The permittee shall pay the United States for any damage resulting from this use.

14. The temporary use and occupancy of the premises and improvements herein described may be sublet by the permittee to third parties only with the prior written approval of the Forest Supervisor, but the permittee shall continue to be responsible for compliance with all conditions of this permit by persons to whom such premises may be sublet.

15. This permit is subject to all valid claims.

16. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this agreement or to any benefit that may arise herefrom unless it is made with a corporation for its general benefit.

17. Upon abandonment, termination, revocation, or cancellation of this permit, the permittee shall remove within a reasonable time all structures and improvements except those owned by the United States, and shall restore the site, unless otherwise agreed upon in writing or in this permit. If the permittee fails to remove all such structures or improvements within a reasonable period, they shall become the property of the United States, but that will not relieve the permittee of liability for the cost of their removal and restoration of the site.

18. This permit is not transferable. If the permittee through voluntary sale or transfer, or through enforcement of contract foreclosure, tax sale, or other valid legal proceeding shall cease to be the owner of the physical improvements other than those owned by the United States situated on the land described in this permit and is unable to furnish adequate proof of ability to redeem or otherwise re-establish title to said improvements, this permit shall be subject to cancellation. But if the person to whom title to said improvements shall have been transferred in either manner above provided is qualified as a permittee and is willing that his future occupancy of the premises shall be subject to such new conditions and stipulations as existing or prospective circumstances may warrant, his continued occupancy of the premises may be authorized by permit to him if, in the opinion of the issuing officer or his successor, issuance of a permit is desirable and in the public interest.

19. This permit may be terminated upon breach of any of the conditions herein by the issuing officer or at the discretion of the Regional Forester or the Chief, Forest Service; provided, the permittee shall have had a reasonable time—not to exceed ninety (90) days—within which to show cause why such termination should not be made.

20. This permit confers no rights upon the permittee to use this National Forest land for purposes other than constructing, maintaining, and operating a transmission line thereon.

21. The permittee shall allow officers and employees of the United States free and unrestricted access in, through, and across the said project and project works in the performance of their official duties and shall allow the Forest Service, without charge, to construct or permit to be constructed in, through, and across the said project, railroads, chutes, roads, trails, conduits, and other means of transportation not inconsistent with the enjoyment of said project by the grantee for the purpose herein set forth.

22. In the event of any conflict between any of the preceding printed clauses or any provision thereof and any of the following clauses or any provisions thereof, the following clauses will control.

STIPULATIONS

TO BE EXECUTED BY THE APPLICANT FOR SPECIAL USE PERMIT OR EASEMENT FOR
TRANSMISSION LINES OF 33 KV OR MORE ON LANDS UNDER FOREST SERVICE JURISDICTION
(36 CFR, PART 251 AS AMENDED ON MARCH 23, 1963 - FR 28-2903)

(1) In the event the United States, pursuant to law, acquires the grantee's transmission or other facilities constructed on or across such easement, the price to be paid by the United States shall not include or be affected by any value of the easement granted to the grantee under authority of the regulations of this part.

(2) The Department of the Interior (hereinafter referred to as the "Department") shall be allowed to utilize for the transmission of electric power and energy any surplus capacity of the transmission facility in excess of the capacity needed by the holder of the easement (subsequently referred to in this document as "holder") for the transmission of electric power and energy in connection with the holder's operations, or to increase the capacity of the transmission facility at the Department's expense and to utilize the increased capacity for the transmission of electric power and energy. Utilization by the Department of surplus or increased capacity shall be subject to the following terms and conditions:

(i) When the Department desires to utilize surplus capacity thought to exist in the transmission facility, notification will be given to the holder and the holder shall furnish to the Department within 30 days a certificate stating whether the transmission facility has any surplus capacity not needed by the holder for the transmission of electric power and energy in connection with the holder's operations and, if so, the amount of such surplus capacity.

(ii) Where the certificate indicates that there is no surplus capacity or that the surplus capacity is less than that required by the Department the authorized officer (as used in this paragraph "authorized officer" means of the Department of the Interior) may call upon the holder to furnish additional information upon which its certification is based. Upon receipt of such additional information the authorized officer shall determine, as a matter of fact, if surplus capacity is available and, if so, the amount of such surplus capacity.

(iii) In order to utilize any surplus capacity determined to be available, or any increased capacity provided by the Department at its own expense, the Department may interconnect its transmission facilities with the holder's transmission facility in a manner conforming to approved standards of practice for the interconnection of transmission circuits.

(iv) The expense of interconnection will be borne by the Department, and the Department will at all times provide and maintain adequate protective equipment to insure the normal and efficient operation of the holder's transmission facilities.

(v) After any interconnection is completed, the holder shall operate and maintain its transmission facilities in good condition; and, except in emergencies, shall maintain in a closed position all connections under the holder's control necessary to the transmission of the Department's power and energy over the holder's transmission facilities. The parties may by mutual consent open any switch where necessary or desirable for maintenance, repair or construction.

(vi) The transmission of electric power and energy by the Department over the holder's transmission facilities will be effected in such manner as will not interfere unreasonably with the holder's use of the transmission facilities in accordance with the holder's normal operating standards, except that the Department shall have the exclusive right to utilize any increased capacity of the transmission facility which has been provided at the Department's expense.

(vii) The holder will not be obligated to allow the transmission of electric power and energy by the Department to any person receiving service from the holder on the date of the filing of the application for an easement, other than statutory preference customers including agencies of the Federal Government.

(d) The Department will pay to the holder an equitable share of the total monthly cost of that part of the holder's transmission facilities utilized by the Department for the transmission of electric power and energy, the payment to be an amount in dollars representing the same proportion of the total monthly cost of that part of the transmission facilities as the maximum amount in kilowatts of the power transmitted on a load basis by the Department over the holder's transmission facilities bears to the total capacity in that portion of the transmission facilities. The total monthly cost will be determined in accordance with the system of accounts prescribed by the Federal Power Commission, exclusive of any investment in the part of the transmission facilities utilized by the Department.

(e) If, at any time subsequent to a certification by the holder or determination by the authorized officer that surplus capacity is available for utilization by the Department, the holder needs for the transmission of electric power and energy in connection with its operations the whole or any part of the capacity of the transmission facility theretofore certified or determined as being surplus to its needs, the holder may request the authorized officer to modify or revoke the previous certification or determination by making application to the authorized officer not later than 36 months in advance of the holder's needs. Any modification or revocation of the certification or determination shall not affect the right of the Department to utilize facilities provided at its expense or available under a contract entered into by reason of the equitable contract provisions provided for in this section.

(f) If the Department and the holder disagree as to the existence or amount of surplus capacity in accordance with the terms and conditions of this paragraph, the disagreement shall be decided by a board of arbitration composed as follows: The holder and the authorized officer shall each appoint a member of the board, and the two members shall appoint a third member. If the members appointed by the holder and the authorized officer are unable to agree on the designation of the third member, he shall be designated by the judge of the United States Court of Appeals of the circuit in which the major share of the facility involved is located. The board shall determine the issue and its determination, by majority vote, shall be binding on the Department and the holder.

(g) As used in this document, the term "transmission facility" includes (a) all types of facilities for the transmission of electric power and energy and facilities for the interconnection of such facilities, and (b) the transmission line and associated facilities, from substation or interconnection point to substation or interconnection point, of which the segment crossing the lands of the United States forms a part.

(h) The terms and conditions prescribed in this document may be modified at any time by means of a written agreement negotiated between the holder and the Secretary of the Interior or his designee.

(i) We have read the foregoing stipulations and agree to accept and abide by the terms and conditions.

NAME OF GRANTEE OR APPLICANT	SIGNATURE OF AUTHORIZED OFFICIAL
	TITLE

SPECIAL USE PERMIT

(Road)

Ref. FSM 2733.

a. RECORD NO. (1-2)

70

b. REGION (3-4)

— —

c. FOREST (5-6)

d. DISTRICT (7-8)

— —

e. USE NO. (9-12)

— — — —

f. KIND OF USE (13-15)

g. STATE (16-17)

— —

h. COUNTY (18-20)

— — — —

k. CARD NO. (21)

of

(Name)

(Address)

(hereafter called the permittee) is hereby authorized to use National Forest lands for the construction, reconstruction, maintenance, and use of a road within the _____ National Forest for the protection, administration, management and utilization of lands and the resources thereof now or hereafter owned or controlled by the permittee.

This permit is subject to the general provisions listed herein and to the special clauses and requirements items _____ through _____, on page(s) _____ through _____ attached hereto and made a part of this permit.

This permit covers a right of way _____ miles in length and containing approximately _____ acres and located upon the ground according to the survey line, figures, measurements, widths, and other references shown on the plat attached hereto and made a part hereof.

Permit class _____.

GENERAL PROVISIONS

1. This permit is subject to all valid rights existing on this date.
2. The permittee in exercising the privileges granted by this permit shall comply with all applicable State and Federal laws, Executive Orders, and Federal rules and regulations.
3. The permittee shall cut only such timber as necessary in clearing for road construction, reconstruction, and maintenance. Timber so cut shall, unless otherwise agreed to, be cut into logs of lengths specified by the Forest Service and decked along the road for disposal by the Forest Service.
4. The permittee shall do everything reasonably within his power to prevent forest fires, and will not dispose of material by burning in open fires during the closed season established by law or regulation without a written permit from the Forest Service.
5. The permittee shall fully repair all damage, other than ordinary wear and tear, to National Forest roads and trails caused by the permittee in exercise of the privileges granted by this permit.
6. No member of or Delegate to Congress or Resident Commissioner shall be admitted to any share in or part of this agreement or to any benefit that may arise herefrom unless it is made with a corporation or trust for general benefit.
7. This permit may be terminated or suspended upon breach of any of the conditions herein or at the discretion of the Regional Forester or the Chief, Forest Service.

THIS PERMIT IS ACCEPTED SUBJECT TO ALL OF ITS TERMS AND CONDITIONS

PERMITTEE	NAME OF PERMITTEE	SIGNATURE OF AUTHORIZED OFFICER	DATE
		TITLE	
ISSUING OFFICER	NAME AND SIGNATURE	TITLE	DATE

U.S. DEPARTMENT OF AGRICULTURE
FOREST SERVICE

TERM SPECIAL USE PERMIT
FOR RECREATION RESIDENCE

Act of March 4, 1915, as amended July 28, 1956
(Ref. FSM 2720)

a. Record No. (1-2) 70	b. Region (3-4) --	c. Forest (5-6) --
d. District (7-8) --	e. Use No. (9-12) --	f. Kind of Use (13-15) 1 2 3
g. State (16-17) --	h. County (18-20) --	k. Card No. (21) 1

(Name) _____ of _____
(Post Office Address and Zip Code)

(hereafter called the permittee) is hereby authorized to use National Forest lands, for the construction and maintenance of a recreation residence for personal recreational use on the _____ National Forest, subject to the provisions of this permit

including items _____ through _____, on page(s) _____ through _____.

This permit covers _____ acres.

Described as: (1) Lot _____ of the _____ tract,
(A plat of which is on file in the office of the Forest Supervisor.)
OR (2) _____ as shown on the attached map.
(Legal Description)

The following improvements are authorized in addition to the residence structure:

Construction or occupancy under this permit shall begin within _____ and construction shall be completed within _____ months. This use shall be exercised at least _____ days each year, unless otherwise authorized in writing. It shall not be used as a full time residence to the exclusion of a home elsewhere.

For this use, the permittee shall pay to the Forest Service, U.S. Department of Agriculture, the sum of _____ Dollars (\$ _____) from _____ 19 _____, to _____ 19 _____, and thereafter annually on _____ Dollars (\$ _____): provided, however, charges for this use shall be reviewed and if necessary adjusted as of and effective on _____ and thereafter at the beginning of each 5-year period from that date, in order to place the charges on a basis commensurate with the value of the use authorized by this permit.

A service charge in addition to the regular fees may be made for failure to meet the fee payment due date. The service charge shall be one percent per month of the fee from the date statements and fees were due or \$ _____, whichever is greater. If the due date falls on a non-workday, the service charge will not apply until the end of the next workday. This permit may be terminated for non-payment of fees and assessed service charges.

This permit is accepted subject to all of its terms and conditions:

ACCEPTED	PERMITTEE'S NAME & SIGNATURE		DATE
	ISSUING OFFICER'S NAME & SIGNATURE		DATE
APPROVED	TITLE		DATE

GENERAL PROVISIONS

1. Nothing in this permit shall be construed to imply permission to build or maintain any improvement not specifically named on the face of this permit or approved by the Forest Service in the form of a new permit or permit amendment. Additional improvements requiring specific approval shall include, but are not limited to: signs, fences, nameplates, mail boxes, newspaper boxes, boat houses, docks, pipelines, and television antennas.

2. Development plans, layout plans, construction, reconstruction, or alteration of improvements; or revision of layout or construction plans for this area must be prepared by a licensed engineer, architect, and/or landscape architect (in those States in which such licensing is required) or other qualified individual acceptable to the issuing officer. Such plans must be approved in advance by the Forest Supervisor.

3. No soil, trees or other vegetation may be removed from the permitted area without first obtaining permission from the Forest Service. All timber cut, destroyed, or injured shall be paid for at current stumpage rates applicable to the sale by the Forest Service of similar timber in the National Forest.

4. The permittee shall maintain the improvements and premises to standards of repair, orderliness, neatness, sanitation, and safety acceptable to the Forest Service.

5. The permittee, in exercising the privileges granted by this permit, shall comply with the regulations of the Department of Agriculture and all Federal, state, county, and municipal laws, ordinances, or regulations which are applicable to the area or operations covered by this permit.

6. The permittee shall take all reasonable precaution to prevent and suppress forest fires. No material shall be disposed of by burning in open fires during the closed season established by law or regulation without a written permit from the Forest Service.

7. The permittee shall exercise diligence in protecting from damage the land and property of the United States covered by and used in connection with this permit, and shall pay the United States for any damage resulting from negligence or from the violation of the terms of this permit or of any law or regulation applicable to the National Forests by the permittee, or by any agents or employees of the permittee acting within the scope of their agency or employment.

8. Avalanches, rising waters, high winds, falling limbs or trees and other hazardous natural phenomena in the forest present risks which the permittee assumes. The permittee has the responsibility of inspecting his site, lot, right-of-way, and immediate adjoining area for dangerous trees, hanging limbs, and other evidence of hazardous conditions and after securing permission from the Forest Service, to remove such hazards.

9. The permittee shall fully repair all damage, other than ordinary wear and tear, to National Forest roads and trails caused by the permittee in the exercise of the privilege granted by this permit.

10. Personal recreation use is defined as non-commercial use by the permittee, members of his immediate family, and guests.

11. The permittee shall protect the scenic and esthetic values of the area under permit and the adjacent land as far as possible consistent with the authorized use during construction, maintenance, and use of improvements thereon.

12. This permit is not transferable. If the permittee through voluntary sale or transfer, or through enforcement of contract, foreclosure, tax sale, or other valid legal proceeding shall cease to be the owner of the physical improvements other than those owned by the United States situated on the land described in this permit and is unable to furnish adequate proof of ability to redeem or otherwise reestablish title to said improvements, this permit shall be subject to cancellation.

But if the person to whom title to said improvements shall have been transferred in either manner above provided is qualified as permittee and is willing that his future occupancy of the premises shall be subject to such new conditions and stipulations as existing or new circumstances may warrant, his continued occupancy of the premises may be authorized by a permit to him if in the opinion of the issuing officer or his successor, issuance of a permit is desirable and in the public interest.

13. This permit is subject to all valid claims.

14. This permit may be terminated upon breach of any of the conditions herein by the issuing officer provided the permittee shall have had a reasonable time-not to exceed ninety (90) days-to show cause why such termination should not be made.

15. Except as provided in Clause 16 below, upon abandonment, termination, or cancellation of this permit, the permittee shall, within a reasonable time all structures and improvements except those owned by the United States, and shall restore the site, unless otherwise agreed upon in writing or in this permit. If the permittee fails to do so, all such structures or improvements within a reasonable time shall become the property of the United States, but that without prejudice to the permittee of liability for the cost of their removal and restoration of the site.

16. If during the term of this permit or any extension thereof the Secretary of Agriculture or any official of the Forest Service acting or under his authority shall determine that the public interest requires termination of this permit, this permit shall terminate upon written notice to the permittee of such determination, and the United States shall have the right thereupon to purchase the improvements, to remove them, or to require the permittee to remove them, at the option of the United States, and the United States shall be obligated to pay an equitable consideration for the improvements, the removal of the improvements and damages to the improvements resulting from their removal. The amount of the consideration shall be fixed by mutual agreement between the United States and the permittee and shall be accepted by the permittee in full satisfaction of all claims against the United States under this clause: provided, that if mutual agreement is not reached, the Forest Service shall determine the amount and if the permittee is dissatisfied with the amount so determined, he may appeal the determination in accordance with the Administrative Procedure Act (36 C.F.R. 211.20-211.37) and the amount as determined on appeal shall be final and conclusive on the parties hereto. That upon the payment to the permittee of 75 percent of the amount fixed by the Forest Service, the right of the United States to remove or require the removal of the improvements shall not be subject to pending final decision on appeal.

17. The permittee may sublease the use of improvements covered by this permit; provided the express written permission of the Forest Supervisor has been secured. The permittee shall continue to be responsible for compliance with all conditions of this permit, whether or not to whom such premises may be sublet.

18. This permit is for lot occupancy and does not provide for the furnishing of road maintenance, water, fire protection, or any other such service by a Government agency, utility association, or division.

19. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this agreement or to any benefit that may arise herefrom.

20. In case of change of address, the permittee shall immediately notify the Forest Supervisor.

21. In the event of any conflict between any of the printed clauses or any provision thereof and any of the following clauses or any provisions thereof, the following clauses will control.

AMENDMENT
FOR
SPECIAL USE PERMIT
Ref: FSM 2714

a. Record no. (1-2)

70
--

b. Region (3-4)

--

c. Forest (5-6)

--

d. District (7-8)

--

e. Use number (9-12)

f. Kind of use (13-15)

THIS AMENDMENT IS ATTACHED TO AND MADE A PART
OF THE

☐ TERM

☐ ANNUAL PERMIT

g. State (16-17)

--

h. County (18-20)

k. Cord no. (21)

1
-

For _____ issued to _____

(KIND OF PERMIT)

(NAME OF PERMITTEE)

, on _____

(DATE OF PERMIT)

which is hereby amended as follows:

This Amendment is accepted subject to the conditions set forth herein, and to conditions _____ to
attached hereto and made a part of this Amendment.

PERMITTEE	NAME OF PERMITTEE	SIGNATURE OF AUTHORIZED OFFICER	DATE
		TITLE	
ISSUING OFFICER	NAME AND SIGNATURE	TITLE	DATE

CHAPTER IV

RESIDENTIAL, COMMERCIAL AND INDUSTRIAL USES

CHAPTER IV

RESIDENTIAL, COMMERCIAL AND INDUSTRIAL USES

I. RESIDENTIAL USES

A. Introduction

Both the Bureau of Land Management and the Forest Service distinguish between seasonal and year-round residences. Residential uses are defined by the Department of the Interior as "single or multi-family dwellings or combinations thereof, and related community facilities, 1/ both seasonal and year-round." 2/ The Forest Service considers the term "residence" to include privately owned houses used as the principal place of residence for year-long occupancy which are directly related to agriculture, 3/ residences of a community nature which are defined as government-owned buildings under the administration of the Forest Service or privately owned buildings on national forest land located in a town, 4/ and cabins and residences used by industries operating in or over national forest lands for the use of construction, maintenance or operating personnel. 5/ These are distinguished from recreation residences defined as "those residences occupying planned, approved tracts established for recreation residence use. The residence may function for winter or summer recreation use or both." 6/ Since the distinction which the Bureau of Land Management and the Forest Service makes between seasonal and year-round residence is consistent with the contract work statement which specified a consideration of residential uses and a special study on vacation homes, this discussion on residential use is divided into two sections, one dealing with general or permanent or year-round residential use and the other with seasonal or vacation or summer use.

Non-recreational residential uses that are incidental to other uses are not considered here. For example, a privately owned house for year-long occupancy constituting a principal place of residence may be used in connection with agriculture 7/ or range facilities. 8/ Such primary uses as agricultural and range uses are the subject of other studies. Residences incident to industrial uses 9/ and dwellings erected for persons caring for canals and ditches 10/ represent a de minimus problem and are not considered.

B. Statutes Providing Exclusively For Residential Use

1. Permanent Year-Round Homes

a. Disposal or Lease. With perhaps one exception, there are no special statutory provisions for disposal or lease that deal

solely with permanent, year-round homes. The one exception may be the provisions for disposal to or use and occupancy of unpatented mining claims as set forth in 30 U.S.C. § 701. It is made the exception because it contemplates disposal to occupant owners using property as a principal place of residence. Moreover, the statute additionally provides 11/ for the occupant to acquire other lands in exchange under certain circumstances "for residential use."

These provisions, enacted on October 23, 1962, authorize the Secretary of the Interior, in his discretion and upon application, to convey maximum tenure in the occupied lands consistent with the public interest to an occupant of an unpatented mining claim which is determined by the Secretary to be invalid or to an occupant of an unpatented mining claim who, after notice that the claim is believed to be invalid, relinquishes to the United States all rights to the claim which he may have under the mining laws. 12/

If the land has been withdrawn in aid of a function of a federal department or agency other than the Department of the Interior, the Secretary of the Interior may convey the land only with the consent of the head of the department or agency affected and under the conditions he specifies. 13/ When such consent is not given, the Secretary of the Interior, after satisfactory arrangements have been made for settling any liability for the unauthorized use which may have occurred and for terminating the applicant's occupancy, may grant the applicant a right to purchase for residential use an interest in another tract made available by him for sale under the Act from unappropriated and unreserved lands or from land subject to classification under § 7 of the Taylor Grazing Act. 14/

To be eligible under the Act, the applicant or his predecessor 15/ must have been an occupant-owner, as of the date of the Act, 16/ of valuable improvements in an unpatented mining claim which constitutes for him a principal place of residence 17/ and which he and his predecessors in interest were in possession of for not less than seven years prior to July 23, 1962. 18/ In a case interpreting this provision 19/ applicants were unsuccessful in acquiring land where they did not meet the burden of showing the property was their principal place of residence; they had other residences and alleged occupancy of the mining claim property for only two months per year plus vacations and weekends. The applicants were also unsuccessful in applying under the Small Tract Act. 20/

The maximum amount of land available under the Act is an area within the applicant's claim of five acres or the number of acres actually occupied by him, whichever is less. 21/ The acreage actually occupied is considered to include the buildings and a reasonable open area around

them, consistent with good zoning practice. 22/ It is the policy of the Secretary of the Interior to grant to qualified applicants maximum tenure consistent with the public interest. Where the public interest does not permit the sale of a fee simple interest, the period of tenure granted will ordinarily not terminate until the land is needed for a public program. And the right to purchase an alternate tract will ordinarily be given where a fee interest cannot be conveyed because consent of the agency having jurisdiction over the lands is not given. 23/

The interest in land to be conveyed, exclusive of any improvements made by the applicant or his predecessor in interest, is to be appraised for its fair market value. 24/ The purchase price may not be more than the appraised fair market value and not less than \$5.00 per acre. 25/ In determining the price to be paid for the interest conveyed within the range the Secretary is to weigh and evaluate the equities claimed by the applicant and also to give consideration to other equities which his field investigation may reveal. 26/

The Bureau of Land Management Manual states that the concept of equities is included in the Act to facilitate its objectives and will be administered to that end. The greater the evidence of good faith, the greater the value of the equities. 27/ The following factors are specified as having a bearing on the applicant's equities: the price paid for the claim, the money expended to develop a mine, the applicant's age and health, whether he is retired or a pensioner, whether he is employed or on welfare, whether a concerted effort was made to develop and extract the minerals, and whether the applicant was relying on custom in his occupancy. 28/

When it is determined that an interest will be conveyed under the Act, an offer will be submitted to the applicant specifying the term of the estate offered, the conditions, limitations, and reservations to be contained in the conveyance, the price to be paid, and the time within which the offer must be accepted. 29/ The Secretary may require that payment be made in a lump sum or in installments. 30/ Upon acceptance of the offer and receipt of all money required, the patent, lease, or permit may be issued. 31/

Conveyances under the Act reserve to the United States all mineral interests in the lands for the term of the estate and provide for payment for the previous unauthorized use of the land. Any conveyance of less than a fee interest includes a provision for the removal of improvements by the conveyance at the end of the term and provides that if the lands are at any time used for other than residential purposes, the estate shall terminate. 32/

b. Use and Occupancy

(1) Granger-Thye Act. Some lands within national forests are occupied by persons who have no better place to go and who are permitted occupancy as a matter of sound social policy. These tracts constitute subsistence residence tracts. They were acquired under the Weeks Law 33/ and are occupied under authority of the Granger-Thye Act. 34/ While such occupancy constitutes a permanent type of residential use, the close relationship to agricultural use makes it a better topic for detailed consideration under that study. 35/

The lands must have been occupied by indigents when the lands were acquired. 36/ The permits issued under Granger-Thye Act authority can remain in effect so long as the indigents occupying the improvements remain qualified. Thereafter, such permits are terminated. 37/

Lands actually occupied and used for a farm at the time of acquisition can be permitted for use and occupancy, but if over forty acres must be approved by the Washington Office. 38/

If permittees who occupy these tracts are unable to pay special-use fees they can obtain an emergency and temporary waiver. 39/ The fee may be paid in whole or in part by services the permittee is required to perform in reconditioning and maintaining the structures. 40/

(2) Miscellaneous Provisions. Residential use may be made of military lands. 41/ While leases of military lands generally cannot run for longer than five years, 42/ the time can be extended if in the public interest. For example, a lease of 75 years has been upheld for a military housing project. 43/

C. Statutes of Broad Applicability Permitting Residential Use

1. Overview

The statutes of broad applicability permitting the disposal or use and occupancy of Section 10 lands (and sometimes related federal lands) for residential as well as other purposes authorize the following. Both the Secretary of the Interior and the Secretary of Agriculture may dispose of townsite land. The Secretary of the Interior may dispose of small tracts, isolated tracts, lands used in connection with irrigation and reclamation projects, lands classified as residential and lands under the Recreation and Public Purposes Act; he may permit the use and occupancy of Section 10 lands under a number of statutes. The Secretary of Agriculture may permit use and occupancy, as distinguished

from making disposals, under his general authority to manage the forests, under the Granger-Thye Act, and under specific statutes authorizing the use and occupancy of forest lands for vacation and temporary homes.

Generally, the laws that have particular application to residential use focus on use and occupancy rather than disposal and deal more extensively with vacation home type occupancy than with permanent year-round occupancy.

Specifically, the following statutes permit the disposal of Section 10 lands for residential as well as other uses. The discussion of these statutes found in Chapter III should be referred to: there are no provisions of particular application to residential use.

43 U.S.C. § 711-731 (1964) authorizes the establishment of town sites and the sale of lands therefrom, which obviously includes sale for residential use. Secretary of the Interior.

43 U.S.C. § 561 (1964) authorizes the establishment of town sites from reclamation lands and the sales of land therefrom, which obviously includes sale for residential uses. Secretary of the Interior.

7 U.S.C. § 1012a (1964) and 16 U.S.C. § 478a (1964) authorize the establishment of town sites on national forest land and the sale of lands therefrom, which obviously includes sale for incidental uses. Secretary of Agriculture.

43 U.S.C. § 682a (1964) authorizes the sale or lease of small tracts which the Secretary of the Interior may classify as valuable for residence (or other) purposes without limitation as to use. Secretary of the Interior.

43 U.S.C. § 1171 authorizes the sale of isolated and mountainous tracts. Secretary of the Interior.

Sales of lands acquired in connection with irrigation projects, 43 U.S.C. § 374 (1964) lands improved at expense of the reclamation funds, 43 U.S.C. §§ 375-375f (1964) and unproductive lands, 43 U.S.C. §§ 424-424a (1964) are authorized without limitation as to purpose. Secretary of the Interior.

Public lands classified for disposal may be sold under 43 U.S.C. § 1421 (1964) pending Public Land Law Review Commission

recommendations if required for orderly growth of a community or if chiefly valuable for residential or other purposes. Secretary of the Interior.

It is clear by reference that a residential use can be a public purpose for which sales or leases are authorized by the Recreation and Public Purposes Act of 1926, 43 U.S.C. § 869(a) (1964). Sales or leases are made only to governmental or nonprofit bodies. Secretary of the Interior.

Finally 40 U.S.C. § 471 et. seq. establishes a system for utilizing and disposing of surplus federal property, including lands. General Services Administration.

In addition, the following statutes permit the use and occupancy of Section 10 lands for residential as well as other uses. These statutes will be discussed herein.

16 U.S.C. § 551 (1964) authorizes the Secretary of Agriculture to regulate the use and occupancy of the national forests. This is the basic authority for issuing terminable special use permits. 44/

16 U.S.C. § 580(d) (1964) authorizes the Secretary of Agriculture to permit the use of structures or improvements under the administrative control of the Forest Service and land used in connection therewith. 45/

16 U.S.C. § 497 (1964) authorizes the Secretary of Agriculture to permit the use and occupancy of national forest lands for several kinds of uses, including "constructing or maintaining summer homes and stores." This is the basic authority for issuing term permits. 46/

16 U.S.C. § 495 (1964) authorizes the Secretary of Agriculture to lease lands near mineral, medicinal or other springs within national forests for the purpose of erecting temporary dwelling houses.

The above statutes are administered by the Forest Service.

16 U.S.C. §§ 1, 3, and 462 (1964) authorize the National Park Service to regulate the national parks, monuments and reservations and historic and archaeological sites, including the authority to permit commercial and private operations.

43 U.S.C. §§ 682(a), 869, and 1201 (1964) authorize the Bureau of Land Management to permit the use and occupancy of Section 10 lands. Permits for the private cabin use of all recreation and conservation areas administered by the Bureau of Land Management are governed by the provisions of 43 C.F.R. §§ 21.1-21.8 (1969). See Chapter III for the provisions governing the leasing of small tracts, 43 U.S.C. § 682a, and lands under the Recreation and Public Purposes Act, 43 U.S.C. § 869, for residential as well as other purposes: there are no provisions unique to residential use.

2. Permanent, Year-Round Homes: Use and Occupancy

There are no provisions of major and unique application to the use and occupancy of sites for permanent, year-round homes. Privately owned residences of a community nature -- year long residences that are part of an urban or rural environment -- are permitted on national forest lands.^{47/} Only annual permits are authorized for such uses and the general policy is to have them on a charge basis.^{48/} Permanent homes are not permitted within the National Park System unless in areas designed prior to 1964.^{49/} In some parks, depending on Congressional authority, villages and subdivisions may still exist.^{50/} In general, residences are allowed in national parks only where required to house persons engaged in on-site public services or the protection of property.^{51/}

3. Vacation Homes, Seasonal: Use and Occupancy

The discussion which follows will focus on the provisions governing the issuance of recreation residence permits by the Forest Service,^{52/} the principal device used to regulate the use and occupancy of forest service lands for seasonal home purposes.

Recreation residences are defined as residences occupying planned, approved tracts established for recreation residence use. The residence may function for winter or summer recreation use or both.^{53/} A recreation residence constitutes a private privilege use of forest lands, and the use will not be allowed to interfere with public or semi-public uses that have a higher priority.^{54/} A permit will not be granted if analysis shows that there will be a conflict with a higher use within twenty years.^{55/} Recreation residences are kept from highways, lakes, fishing streams, and other public use and scenic attraction areas,^{56/} and are not permitted in isolated, scattered areas.^{57/} Further, under

the Wilderness Act, 58/ seasonal homes are not permitted in wilderness areas under the jurisdiction of the Forest Service unless necessary for realizing recreational or other wilderness purposes. 59/

Once a permit has been granted, the permittee has exclusive use of the lot, but his use is highly circumscribed. The location of improvements, latrines and garbage pits on lots and the architectural design, dimensions, and types of materials used are all subject to approval by the forest officer. 60/ Ordinarily, only the recreation residence and its appurtenances are permitted; other structures are discouraged. 61/ Recreation residences cannot be used for keeping livestock, saddle horses or poultry, 62/ and cannot be used primarily as rental property 63/ or for business or commercial purposes. 64/ These kinds of provisions effectuate a policy of managing the national forest for the greatest good of the greatest number of people. 65/

Use of recreation residences as a principal place of residence is contrary to basic Forest Service objectives and policies, 66/ but an applicant must state that the lot will be occupied at least fifteen days annually. 67/

A single family may hold only one recreation residence permit. 68/ Ordinarily, a recreation residence is a single family use, although the Forest Service recognizes the desirability of optimizing recreation benefits by having facilities shared by more than one family. 69/ However, while more than one family may have an interest in a recreation residence, the permit is issued only to one person for administrative purposes. 70/ Such an arrangement may create problems if the several parties do not enter into a private agreement concerning the use and transfer of the property. The convenience to the Forest Service justifies such a provision as against the inconvenience to multiple owners of recreation residences.

Condominiums are authorized as recreation residences. 71/ However, current Forest Service policy is to review condominium proposals only in relation to an already permitted use: so far, such permits have been limited to structures at or near winter sports sites, and such use has been authorized only in conjunction with a winter sports operation. Consideration will not be given to a condominium unless at least 50 percent of the apartments are available at all times for public use. 72/

The maximum acreage permitted for the use and occupancy of summer homes under the authority of the 1915 Term Permit Act 73/ is five

acres, as distinguished from the eighty acres allowed for other uses. 74/ Typically, the lots are one-half acres with appropriate buffering between lots. 75/

Recreation residence permits may be annual permits or term permits. If the latter, they will ordinarily be issued for twenty years. Term permits are preferred by the Forest Service over annual permits. 76/ Where land is clearly needed for a higher public purpose and advance notice of termination has not been given so as to permit a ten year term after notice, a ten year term will apply except where other federal agencies are requesting the land. Where land is needed within ten to twenty years the permit shall provide for a ten year notice of termination. 77/ Where land is not needed for twenty years, holders of annual permits can secure a twenty year permit providing for continuance for the second ten years if the permittee receives no contrary notice prior to the expiration of the first ten years. 78/ To the extent possible, the Forest Service seeks to give all permit holders in a tract the same kind of permits and termination dates. 79/

Residence lots including recreation residences are rented for their fair commercial value for residence purposes, with a minimum of \$25.00. This may vary if a higher minimum is appropriate in some regions. The average summer home lot assumes a public road, pleasant forest, reasonable proximity to supplies and places of interest and a sales price of \$600.00. Fees are increased because of proximity to streams, lakes or recreation assets, outstanding views or vegetation, accessibility, proximity to population centers and availability of utilities. The cost of roads is amortized and included in the fee, and five percent of the sale value of comparable private land is considered a fair annual rental. Rental is not increased for homes used for more than the summer season. Fees are reviewed at a five year interval. If improvements are put in, fees may be increased by appraising the lots on the basis of the improvements or by amortizing the cost of the improvements and adding it to the existing fee. 80/ The Forest Service keeps fees as uniform as possible within a tract; and when making or contracting for appraisals, the fair market value figures are to be carefully reviewed to reflect the restrictions and constraints peculiar to Forest Service land use. 81/ Annual fees are the same for annual and long term permits. 82/ If an additional structure other than a residence and its appurtenances is permitted, an additional fee is imposed, again at the \$25.00 minimum. 83/ Fees are not adjusted if because of termination they would not be effective for more than five years. 84/

Permits for recreation residences may be terminated when the lands are needed for public uses or such semi-public uses as campgrounds and winter sports developments. 85/ A bill was introduced in Congress 86/ which would have required compensation to the permittee of a summer or recreation-type residence if this permit were terminated or not renewed or extended. Compensation would be equal to the cost of moving to an available site or, if no sites were available, at the appraised value of the residence and related structures. In making valuations, consideration was also to be given to the permittee's share in any community facilities constructed and maintained by the permittee. The bill did not pass.

When ownership of recreation residences is transferred, including as the result of a settlement of an estate, nonconformities under the permit are to be corrected. In the case of a transfer because of death, the heirs are entitled to a permit reflecting current policies, and an equitable determination date is to be provided with respect to sites scheduled for a higher use. 87/ Sales require approval of the forest supervisor. 88/

A bill to convert all Forest Service special use permits into possessory interests was considered in 1967. 89/ Under this and other similar bills, the permittee would obtain the entire possessory interest in all structures acquired or built, leaving only the bare legal title in the United States. The bill was so worded as to apply to residential uses only. The proposed possessory interest would continue despite termination of the special use permit, the interest could be transferred, and compensation would be required if it were taken for public use, compensation to be based on reconstruction cost less depreciation not to exceed fair market value. None of the bills passed.

A similar bill applying to lessees or permittees on Bureau of Land Management lands was introduced in the 91st Congress. 90 While the bill applied to any structure, fixture, or improvement, it indicated that the possessory interest shall not be construed to include any right to engage "in any business or other commercial activity." This provision may have been intended to make the possessory provision applicable only to residential uses. It is also construable as an attempt to remove any implication that acquisition of a possessory interest changes any rights as to type of use.

Isolated cabins on forest lands do not constitute recreation residences, defined as residences on planned, approved tracts. They are placed under special permit as an administrative expediency to cure innocent

trespass and mining claim problems. 91/ The policy of the Forest Service is to issue such permits only as a settlement device. The permit is to contain a termination date and a nontransferable provision or such other stipulation that will ensure removal of the structure and restoration of the site. The period of occupancy normally is not to exceed ten years. 92/

The Forest Service, finally, is authorized to issue leases for temporary dwelling houses near mineral or other springs within National forests. 93/ Forest Service regulations merely provide that such leases are to contain such terms, stipulations, conditions and agreements as may be required in the public interest. 94/

Although the National Park Service may permit the use and occupancy of National park lands, 95/ seasonal homes are not allowed in National park areas unless on lands designated for such purposes prior to 1964. 96/

Finally, the Bureau of Land Management gives permits for private cabin sites 97/ in recreation and conservation areas where general public recreational requirements are limited, but there is little material peculiarly relevant to cabin site permits as distinguished from permits for other uses except for termination provisions. If the public interest is deemed to prevail, improvements cannot be placed on a cabin site without prior approval, 98/ and the placement of such improvements does not add any rights except the right of removal. A reasonable time for amortization is allowed, but only for the period of the existing permit plus extensions that are not inconsistent with public use. Once private use is deemed inconsistent, permits are limited to five years after such determination, 99/ unless a substantial improvement exists in which case a twenty year amortization period is permitted from the date of the investment in the improvement. A lesser period is contemplated where the needs of the general public require it.

Other provisions indicate that unless unfair or inefficient, Bureau of Land Management permits ending prior to the expiration of the five year period will be renewed only to the end of the five year period. Renewals are contingent upon continued maintenance of the property and carry the general notice, with exceptions, that an additional renewal will not be allowed, improvements must be removed on termination, and the site must be left reasonably unimpaired. Transfers are allowed only on approval, and the transferee is notified that he has only the rights of the transferer. Nonuse for two years terminates the permit. 100/

II COMMERCIAL AND INDUSTRIAL USES

A. Introduction

In this section the definitions of "commercial" and "industrial" used for purposes of classification will be adopted. "Commercial" refers to the sale, exchange, or distribution of goods and services. 101/ "Industrial" refers to the manufacture, processing, and testing of goods and materials, including the production of power; the growing of agricultural crops, the raising of livestock, and the extraction or severance of raw materials from the land are excluded, but the activities incidental thereto are included. 102/

Various kinds of commercial and industrial uses are dealt with specifically at the administrative level;103/ the statutes and codified regulations rarely refer to particular or generic kinds of commercial uses. Details of each of the kinds of permissible commercial and industrial uses are not covered in this study. Since the detailed provisions are reminiscent of use categories in zoning, they are a fit subject of a land use planning study, if appropriate for study at all. Only provisions of general applicability will be discussed herein.

Little of the following discussion relates particularly to industrial uses. When statutes contemplate industrial uses, such uses are rarely treated differently from other commercial uses.

B. Statutes Providing Exclusively for Commercial Use

1. General Observations

There are no statutes which provide exclusively for the disposal of Section 10 lands for commercial purposes. The statutes discussed in this section provide for the use and occupancy of Section 10 lands for commercial purposes. Three of the statutes 104/ deal with commercial uses that are permitted in order to serve the needs of transient persons such as tourists who use Section 10 lands. Obviously, many persons who must live permanently on the land to serve the tourists' needs also use such services. However, the rationale for the statutes is to provide needed services for visitors. 105/ The fourth statute deals with services to permanent residents on Federal lands who are organized into a community.

One of the statutes dealing with commercial facilities serving transient persons 106/ is relatively recent, having been enacted in 1965 after major consideration. It represents a departure from the earlier statutes in that it recognizes the need to authorize exclusive permits to one commercial enterprise and to confer a possessory interest in the structures erected by the permittee. In addition, compensation on termination is provided.

2. Concessions on Lands Administered by the
National Park Service

Concessions for tourist accommodations, facilities, and services are permitted in areas administered by the National Park Service and are covered by a statute limited to such use. 107/

The policy of the statute is to provide adequate services and facilities at reasonable prices under carefully controlled safeguards so that heavy visitation will not impair values. 108/ To this end, concession facilities are not permitted in natural areas where there are other adequate facilities outside the area. 109/ Commercial uses are permitted in recreation areas only insofar as consistent with the "carrying capacity" of the area. 110/ The number of sites, locations, and sizes of tracts available for concession use is held to the minimum essential to proper and satisfactory operation. 111/ Moreover, plans and specifications for buildings and structures must be approved by the Park Service to make certain they are in harmony with the surroundings. 112/ The items that may be sold by the concessioner are limited to those which are appropriate and necessary for the public use and enjoyment of the area, 113/ and the reasonableness of the concessioner's prices are regulated. 114/

Concessions are available to private persons and corporations. 115/ A policy of encouraging the continuity of operations is expressed. The Secretary of the Interior is given discretion to extend or renew existing concession agreements. One responsible concessioner may be given exclusive authority to offer all accommodations, facilities and services in an area. He may also be given a preferential right to provide new or additional accommodations, facilities and services. 116/

The concession may be obtained by privilege, permit, lease, or contract. 117/ In addition to the right to use and occupancy, the concessioner acquires a possessory interest consisting of all incidents of ownership except legal title, in any structures, fixtures or improvements he erects. 118/ This interest may be assigned, transferred,

encumbered or relinquished. 119/ However, the existence of a possessory interest does not authorize any particular kind of activity; that authorization is subject to the contract and the laws and regulations governing the area. 120/

Probably the most important feature of the statute is the provision for compensation on termination. The agreement may provide for terms to protect the concessioner against loss of investment in structures, supplies and other tangible property because of governmental decisions being made after the agreement is entered which terminate the concessioner's authority to conduct his business. 121/ The concessioner's possessory interest in structures, fixtures and improvements is also protected. 122/ The possessory interest is not extinguished by expiration or termination of the agreement and may not be taken for public use without just compensation. 123/ Unless otherwise provided by agreement, just compensation is leased at reconstruction cost less depreciation, not to exceed fair market value. The possessory interest provisions do not apply to agreements preexisting the statute unless the Secretary of the Interior determines that equity warrants such recognition. 124/

Concession fees, however stated, are to be determined upon consideration of the probable value to the concessioner of the particular contract or privilege involved. Consideration of revenue to the United States, however, is to be subordinated to the objectives of preserving the areas and providing adequate service to visitors. 125/

3. Hotels, Bathhouses, etc. On Lands Adjacent To Mineral, Medicinal Or Other Springs Administered By the Bureau of Land Management

The Secretary of the Interior is authorized to lease lands adjacent to mineral, medicinal, or other springs for the erection of bathhouses, hotels or other improvements for the accommodation of the public. 126/ While the statute authorizes the issuance of permits or leases, the regulations pursuant to the statute 127/ provide only for the issuance of leases. Also, more modern uses than those specifically mentioned in the statute are entertained; for example, use of the land for the operation of a billiard hall and for the operation of a moving picture theatre is permitted. 128/

Leases may be issued for surveyed or unsurveyed unreserved public lands in the several states, situated near or adjacent to mineral,

medicinal, or other springs which are located upon unreserved public lands and for public lands which have been withdrawn for the protection of such springs. 129/

Leases may be granted to private persons, 130/ private corporations 131/ or municipalities. 132/ No preference rights are granted.

The period of time for which the lease is granted is set by the lessee in his application, but may not exceed twenty years. Again, the size of the lease is determined primarily by the lessee who describes the land desired in his application. A lease may be granted for part of a legal subdivision or for more than one legal subdivision. 133/ However, the granting of a lease is discretionary, 134/ and the duration and size set out in the application need not be approved in its entirety.

The lessee must specify all the purposes for which he intends to use the land in his application. The lease, if granted, will authorize the use of the land only for the purposes specified, and its use for any other purpose will not be permitted. 135/

All leases authorize the Bureau of Land Management's manager to fix the rates and prices for accommodations and services provided by the lessee whenever he deems it necessary. 136/

It might be assumed that some charge is made for the granting of the lease, especially since the lessee himself is authorized to charge the public for use of the facility he erects. However, no specific calculation of charges, rental fees, etc., has been ascertained. It may be that the erection of such improvements for the benefit of the public is considered sufficient consideration for granting the lease. Also, no provision is made for compensation for improvements or for the lessee's removal of improvements after the lease has terminated.

4. Sanitariums And Hotels On Lands Near Mineral,
Medicinal Or Other Springs Administered By The
Forest Service

While 16 U.S.C. § 495 also provides for the erection of tents and dwelling houses and therefore does not authorize an exclusively commercial use, it is so similar to 43 U.S.C. § 971 that it will be treated as a special law authorizing commercial use. The statute provides that sites for sanitariums or hotels open to the public can be leased within National forests in areas near mineral, medicinal

or other springs. 137/ These facilities may be erected where the public is accustomed to or desires to frequent the springs for health or pleasure. Terms, duration, and compensation to be paid for the "privilege" are within the discretion of the Secretary of the Agriculture. 138/

5. AEC Administered Lands

The Atomic Energy Commission may permit commercial use by granting a privilege, lease or permit on lands within communities it owns. The use and occupancy is permitted to responsible persons, taking into consideration the quality and type of services required by the residents of the community, the experience of the concession applicant in the area, the ability of the applicant to meet the needs of the community, and the contribution the applicant may make to other activities and to the welfare of the community. Fair and reasonable charges are to be made by the Atomic Energy Commission. 139/

C. Statutes of Broad Applicability Permitting Commercial Use

1. Overview

Generally, the laws that have particular application to commercial use focus on use and occupancy rather than disposal.

Specifically, the following statutes permit the disposal of Section 10 lands for commercial as well as other purposes including industrial. The discussion of these statutes found in Chapter III should be referred to: there are no provisions of particular application to commercial use.

43 U.S.C. §§ 711-731 authorize the establishment of town sites and the sale of lands therefrom, which would include the sale of land for commercial and industrial purposes. Secretary of the Interior.

43 U.S.C. § 561 authorizes the establishment of town sites on reclamation lands and the sale of land for commercial and industrial purposes. Secretary of the Interior.

7 U.S.C. § 1012a, 16 U.S.C. § 478a authorize the establishment of townsites on National forests and the sale of land therefrom, which could include the sale of land for commercial and industrial purposes. Secretary of Agriculture.

43 U.S.C. § 682a authorizes the sale or lease of small tracts which the Secretary of the Interior may classify as chiefly valuable for business purposes. Secretary of the Interior.

43 U.S.C. § 1171 authorizes the sale of isolated and mountainous tracts for any purpose. Secretary of the Interior.

The sale of lands improved at the expense of the reclamation funds, 43 U.S.C. §§ 375, 375(b) and unproductive reclamation lands, 43 U.S.C. § 424 is authorized without limitation as to purpose. Secretary of the Interior.

Public lands classified for disposal may be sold under the Public Land Sale Act of 1964, 43 U.S.C. § 1421, pending Public Land Law Review Commission recommendations if required for the orderly growth of a community or if chiefly valuable for commercial, industrial or other purposes. Secretary of the Interior.

While only a temporary law, the Public Land Sale Act of 1964 is important in connection with commercial and industrial uses. Under the other authority described in this list of statutes, lands available for disposal may not be appropriate to industrial and commercial use. For example, the townsite laws are rarely used and establishing a town just to establish a commercial or industrial use is troublesome. The Small Tract Act can be used, but not for large sites. Reclamation lands may not be appropriately located and for profit operations are not eligible under the Recreation and Public Purposes Act. While Land could be disposed of by declaring it surplus, that route is indirect.

The provisions for commercial and industrial use have not been significantly elaborated by regulation, perhaps due to the temporary nature of the 1964 Act.

It would appear that a commercial or industrial use could be a public purpose for which sales and leases are authorized by the Recreation and Public Purposes Act of 1926, 43 U.S.C. § 869(a). Sales and leases are to be made only to Governmental bodies and nonprofit organizations, but the fact that a charge is to be exacted does not disqualify an applicant. Secretary of the Interior.

40 U.S.C. § 471 et. seq. establishes a system for the utilization and disposal of surplus Federal property, including lands. In general, disposal is without limitation as to purpose. General Services Administration.

In addition, the following statutes permit the use and occupancy of Section 10 lands for commercial as well as other uses. These statutes will be discussed herein.

16 U.S.C. § 551 authorizes the Secretary of Agriculture to regulate the use and occupancy of the National forests. This is the basic authority for issuing terminable special use permits. 140/

16 U.S.C. § 580(d) authorizes the Secretary of Agriculture to permit the use of structures or improvements under the administration of the Forest Service and land used in connection therewith. 141/

16 U.S.C. § 497 authorizes the Secretary of Agriculture to permit the use and occupancy of National forest lands for specified uses, including use for commercial or industrial purposes.

16 U.S.C. § 495 authorizes the Secretary of Agriculture to lease lands on National forests for sanitariums or hotels as well as for temporary dwelling houses. Because of its similarity to 43 U.S.C. § 971, it is treated as a special use statute.

The above statutes are administered by the Forest Service.

16 U.S.C. § 460(d) authorizes the Chief of Engineers to permit the construction and operation of public park and recreational facilities in reservoir areas. The construction and operation of such facilities could, of course, be a commercial use. See 36 C.F.R. § 311.16.

16 U.S.C. §§ 1, 3, and 462 authorize the National Park Service to regulate the National parks, monuments and reservations, and archaeological and historic sites, including the authority to permit commercial and private operations.

43 U.S.C. §§ 682a, 869, and 1201 authorize the Bureau of Land Management to permit the use and occupancy of Section 10 lands. Permits for commercial uses may be granted under 43 U.S.C. § 1201, see 43 C.F.R. § 2236.3-2. Leases for business purposes may be granted under the Small Tract Act, 43 U.S.C. § 682a, and presumably under the Recreation and Public Purposes Act, 43 U.S.C. § 869. For a discussion of the general leasing provisions under these acts governing commercial as well as other uses, see Chapter III.

2. Discussion

In determining whether a commercial use may be made of Forest Service lands, emphasis is placed on whether the activity provides a needed public service. Commercial profit-making enterprises are permitted only where there is a general public need and the activity will be compatible with multiple use and recreation management planning.^{142/} Such facilities are usually not permitted if private land is available and logically suited to meet the need.^{143/} Gambling devices are not permitted on Forest Service lands even though gambling may be legal under state law, because gambling is not considered a needed public service.^{144/} The sale of alcoholic beverages is not permitted as a separate use on Forest Service lands.^{145/}

Although authorized by statute, as a matter of policy the commercial use of National park lands is not permitted except as specially authorized by law or as may be incidental to the accommodation and entertainment of visitors.^{146/} The facilities and services permitted for the accommodation of visitors in areas administered by the National Park Service have been discussed in this section, supra.

Commercial use is more limited on some lands than others. For example, the only commercial uses permitted in areas designated under the Wilderness Act 147/ are those necessary to realize the recreational or other wilderness purposes of the area. 148/ This ordinarily means that no commercial facilities will be permitted except facilities offered by packers, outfitters and guides, 149/ pre-existing commercial establishments 150/ and preexisting uses such as use by motorboats and aircraft landing fields. 151/ When land is adjacent to lands available under a Granger-Thye permit 152/ the adjacent lands can be used for a related use only, such as the erection of cabins to be operated in conjunction with a Government-owned resort. 153/

There may be a conflict between serving the needs of the public and preserving the natural area values of the land. An example is the Walt Disney Productions plan for building a \$35 million modern day, 300 acre ski resort at Mineral King. It can be expected that the development will be an efficient, well-managed, people-generating ski-resort facility in the tradition of Disneyland. Permission to develop the facility came from the Forest Service, and it is clear that some feel the Service has become too development oriented and is not sufficiently observing its trust to conserve and preserve natural areas. As a result, the Federal Government has been sued by the Sierra Club in the San Francisco, Federal District Court alleging that the lease covering 300 acres is above the maximum eighty acres permitted for resorts. 152/ A plan to permit the use of the extra 220 acres from year to year is alleged to be illegal. 153/ The suit also alleges that the development will conflict with the establishment of the area in 1926 as a National game refuge and will damage fish and wildlife in the area. The suit further alleges that a permit should not be given for a nine mile access road which allegedly would jeopardize Sequoia trees in the area. A temporary injunction was issued July 23, 1969 by U.S. District Court Judge William Sweigert enjoining the Department of the Interior and Agriculture from issuing permits for the facility and the Park Service from issuing a permit for the road. 156/

The 1915 Act applying to National Forests, 16 U.S.C. S 497, is the only statute which specifically authorizes use and occupancy for industrial purposes.

Rights and interests are variously created. The Bureau of Reclamation issues permits for boating and docking privileges. 157/ Reservoirs and lands under control of the Department of the Army can be used for commercial operations in accordance with a lease, license,

or other agreement. 158/ Business operations are permitted in park areas under permit, contract or other written agreement unless specifically authorized by special regulations applicable to the park area. 159/ Use and occupancy of historic and archaeological sites is permitted under concession, lease, or permit. 160/ The use and occupancy of Forest Service lands is regulated by permit. The uses authorized by 16 U.S.C. § 497 and 16 U.S.C. § 580(d) -- which expressly include commercial and industrial use -- are designated special uses and require special use permits. 161/ Permits and leases are issued by the Bureau of Land Management. However, permits will not be issued in any case where provisions of the existing public land laws may be invoked; thus, permits will not be issued authorizing the use of public lands for business sites where a lease could be obtained under the Small Tract Act or the Recreation and Public Purposes Act. 162/

With few exceptions, applicants for commercial and industrial uses need have no special qualifications. However, Bureau of Reclamation permits for boating and docking privileges can be issued only if the applicant owes no debt to the United States. 163/ When a permit to render commercial service is issued by the Forest Service, the applicant is required to show among other things that he has the ability to perform, that he has liquid assets of at least 25 percent of the estimated development cost, and that he has business experience. An attempt is made to obtain the best qualified permittee. 164/ Further, the Forest Service indicates that the development and operation of public facilities on National forest lands by other public agencies is uncommon, usually unnecessary, and normally undesirable. 165/

A Bureau of Reclamation permit for boating and docking privileges may be issued for a period of fifty years. Permits may be issued by the National Park Service for a period of thirty years, 166/ as may term permits issued by the Forest Service. 167/ A term permit issued by the Forest Service may be revoked for breach of its terms, violation of law or regulation, and in the public interest. 168/ A permit may not be issued by the Bureau of Land Management for a period exceeding five years; it may be revoked for breach of any condition and may also be revoked in the discretion of the Bureau of Land Management officer if he determines that the land should be devoted to another use. 169/

Generally, the statutes do not specify acreage limitations that apply specifically to commercial and industrial sites. The maximum area covered by a Forest Service term permit is eighty acres regardless

of use. 170/ When the permit is issued under the Granger-Thye Act, 171/ an additional acreage may be included over adjacent lands, but the total acreage covered by the permit may still not exceed eighty acres. However, additional acreage may be included under an annual permit. 172/ A Bureau of Land Management permit will not be issued for more than five acres, except upon a showing of special need. 173/

Typically, the policy is to minimize rather than maximize the areas available. For example, Granger-Thye Act permits 174/ over forest lands are limited in area covered to the reasonable minimum required in relation to use of the improvements. 175/ Forest Service permits for radio sites are to be no larger than necessary and are to contain a clause allowing adjustment of the permitted area as necessary. 176/

A wide variety of conditions can be imposed on use and occupancy because permits are a privilege and contracts such as licenses and leases can be tailored to purpose. For example, conditions can be imposed on a lease for a commercial campsite that will guard against its becoming an eyesore. 177/ Under the statutes of broad applicability, there are no special obligations imposed on commercial-industrial occupiers as a class save some typical general requirements to serve the public needs and charge reasonable prices. Nor are there significant conditions unique to commercial-industrial uses as a class. There are special conditions and obligations imposed on certain types of uses. For example, all concession uses authorized by the Forest Service are required to carry public liability insurance whenever this is in the public interest and practicable. 178/ Concession permits also have a clause indemnifying the Government in the event of damage or claims resulting from the permitted use. 179/ Under a Granger-Thye permit 180/ the permittee is required to carry fire insurance on the Government-owned improvements equivalent to their replacement value. 181/ Permits on park lands issued for eating, drinking or lodging establishments must be maintained and operated in accord with U.S. Public Health Service rules and state and local laws. 182/ Permittees for ski-tows are required to have facilities for avalanche control, avalanche rescue, ski patrol and first aid, aerial life evacuation, communication, signs and the like. 183/

Special use permits are not available for free from the Forest Service if the operation is of a commercial nature. 184/ Fees charged for commercial permits by the Forest Service include a graduated fee applied to sales in the case of concession uses. This fee fluctuates. There is also a minimum fee based on the least amount acceptable to the Government for the directly attributable sales, as in the case of

radio-electronic sites and industrial plants, the fee is based on a percentage of the on-site investment ranging upward from two-tenths of one percent of the investment. 186/ Flat fees are used if the estimated fee is under \$250.00 and may be used if under \$1,000. If the estimated fee is over \$1,000, a graduated fee based on sales must be used. Fees are collected monthly where possible. 187/ The fee is generally to be commensurate with the value of the use 188/ and minimum fees for particular uses are sometimes used.

Holders of Bureau of Land Management permits must pay in advance the annual rental fixed by the permit which is to be based upon the value of the land for the use to which it is to be put. The minimum rental charge is fixed at \$5.00 per annum. Permits may be issued free of charge to agencies of the Federal Government and the states and political subdivisions thereof. 189/ Small tracts 190/ are leased for a minimum of \$100.00 per year in the case of business sites, as opposed to \$25.00 per year for other sites. 191/

Footnotes

1. In this study community facilities are treated separately, see Chapter V, § II, infra.
2. 43 C.F.R. § 2410.0-5(a)(1969).
3. Forest Service Manual § 2722.23 (Amend, No. 15, Jan. 1969).
4. Forest Service Handbook § 2713.50 (Amend. No. 106, July 1960).
5. Forest Service Manual § 2724.11(a) (Amend. No. 15, Jan. 1969).
6. Forest Service Manual § 2721.23 (Amend. No. 15, Jan. 1969).
7. Id. § 2722.23.
8. Id. § 2722.24.
9. Id. § 2724.11(a).
10. 43 U.S.C. § 950 (1964).
11. 30 U.S.C. § 704(a) (1964).
12. Id. § 701 (Supp. IV, 1969); Id. §§ 702-709 (1964); 43 C.F.R. §§ 2215.0-2(a), 2215.0-3(a) (1969). Department of the Interior regulations provide that a person who holds a mining claim which has not been invalidated and who wishes to determine whether he should make application under the Act may petition the Bureau of Land Management for a Statement of Belief as to the validity of the claim on which occupancy exists. 43 C.F.R. § 2215.1 (1969); Bureau of Land Management Manual § 2215.1 (Release 1-18, Feb. 24, 1966).
13. 43 C.F.R. §§ 2215.0-3(b) (1969).
14. 43 U.S.C. § 315(f) (1964).
15. Bureau of Land Management Instruction Memorandum from Director to State Directors, Reference 2233 (722a) (Nov. 9, 1964).

16. Applicants whose claims have been invalidated or relinquished prior to October 23, 1962, the date of the Act, are not eligible. Grady L. Johnson, 72 I.D. 426 (1965).
17. Department of the Interior. . . impractical for use, 43 C.F.R. § 2215.0-5(d) (1969). Bureau of Land Management policy. . . in use. Bureau of Land Management Manual § 2215.05B (Release 2-22, May 31, 1966).
18. 43 C.F.R. §§ 2215.0-5(a) (1969).
19. Robert A. Johnson, A-30951 (Nov. 21, 1968).
20. 43 U.S.C. §§ 682(a) - (e) (1964).
21. 30 U.S.C. § 701 (Supp. IV, 1969); 43 C.F.R. §§ 2215.0-3(a) (1969).
22. Bureau of Land Management Manual § 2215.31B (Release 2-22, May 31, 1966).
23. 43 C.F.R. §§ 2215.0-2(a) - 3(b) (1969).
24. Id. §§ 2215.0-3(c).
25. Id.
26. Id. §§ 2215.0-2(b).
27. Bureau of Land Management § 2215.02A (Release 2-22, May 31, 1966).
28. Bureau of Land Management Manual Supp. § 2215.2B6 (Release 1-18, Feb. 24, 1966).
29. 43 C.F.R. §§ 2215.0-3(c) (1969).
30. Id. § 2215.3.
31. Bureau of Land Management Manual Supp. §§ 2215.3A1, 2 (Release 2-6, May 31, 1968).
32. 43 C.F.R. §§ 2215.0-3(d), (f) (1969); Bureau of Land Management Manual § 2215.3C1 Illustrations 2 and 3 (Release 2-6, May 31, 1968).

33. 16 U.S.C. §§ 516, 518, 519 (1964).
34. 16 U.S.C. § 580(d) (1969).
35. Forest Service Manual § 2715.44b (Amend. No. 12, Oct. 1968).
36. 16 U.S.C. § 580(d) (1964); see Forest Service Manual § 2711.32 (Amend. No. 12, Oct. 1968).
37. Forest Service Manual § 2711.32 (Amend. No. 12, Oct. 1968).
38. Id.
39. Id. § 2715.44b.
40. Id. § 2711.32.
41. 10 U.S.C. § 2667(b)(1) (1964).
42. Id.
43. Meade Heights, Inc. v. State Tax Comm'n. 202 Md. 20, 95A. 2d 280 (1953), under the Wherry Act, Act of Aug. 8, 1949, 63 Stat. 570.
44. Forest Service Manual § 2701.1 (Amend. No. 12, Oct. 1968).
45. Section 7 of the Granger-Thye Act, 64 Stat. 84 (1950).
46. Forest Service Manual § 2721.23a (Amend. No. 15, Jan. 1969).
47. 16 U.S.C. § 551 (1964).
48. Forest Service Manual § 2723.16 (Amend. No. 15, Jan. 1919).
49. Recreation Areas, supra note 8a.
50. Id. at 19.

51. National Park Service, U. S. Dep't of Interior, Administrative Policies for Recreation Areas of the National Park System § 1 (1968) (hereinafter cited as Recreation Areas); National Park Service, U.S. Dep't of Interior, Administrative Policies for Natural Areas of the National Park System 61 (1968) (hereinafter cited as Natural Areas); National Park Service, U.S. Dep't of Interior, Administrative Policies for Historical Areas of the National Park System 64 (1968) (hereinafter cited as Historical Areas). Historical structures can be occupied as residences where occupancy will facilitate the management of the programs in the area. Id. 64-65.
52. Recreation residence permits are special use permits issued by the Forest Service. Forest Service regulations provide that all uses of the lands authorized by 16 U.S.C. §§ 497, 580(d) (1964) shall be designated special uses and shall be authorized by special use permit. 36 C.F.R. § 251.1(a) (1969).
53. Forest Service Manual § 2721.23 (Amend. No. 15, Jan. 1969).
54. Id. §§ 2395, 2721.23b1 (Amend. No. 15, Jan. 1969).
55. Id. § 2721.23c.
56. Forest Service Handbook § 2713.50f (1958).
57. Id. § 2713.50 (Amend. No. 106, July 1960).
58. 16 U.S.C. §§ 1131-1136 (1964), as amended, (Supp. IV, 1969).
59. 36 C.F.R. § 251.77 (1969).
60. Forest Service Handbook §§ 2713.50f (1958) - g (Amend. No. 48, July 1959), as amended, (Amend. No. 106, July 1960).
61. Forest Service Manual § 2721.23e6 (Amend. No. 15, Jan. 1969).
62. Id. §§ 2721.23b4, 2345.
63. Id. §§ 2721.23b5, 2345.
64. Id. §§ 2721.23b6, 2345.

65. Forest Service Handbook § 2713.74-3 (1958).
66. Id. § 2356.
67. Id. § 2721.23d.
68. Id. § 2721.23b.
69. Id. § 2721.23b2.
70. Id. § 2721.23b2.
71. 16 U.S.C. § 497 (1964).
72. Forest Service Manual § 2721.31 (Amend. No. 15, Jan. 1969).
73. 16 U.S.C. § 497 (1964).
74. Forest Service Manual § 2721.23b (Amend. No. 15, Jan. 1969).
75. Forest Service Handbook § 2713.50f (1958).
76. Forest Service Manual § 2721.23a (Amend. No. 15, Jan. 1969).
77. Id. §§ 2721.23b9, 2345.
78. Id. §§ 2721.23b9, 2780.
79. Id. §§ 2721.23b10, 2721.23d, 2345.
80. Id. § 2721.23e; Forest Service Handbook 2713.50d-e (1958).
81. Forest Service Manual § 2721.23e3 (Amend. No. 15, Jan. 1969).
82. Id. § 2721.23e4.
83. Id. § 2721.23e6.
84. Id. § 2721.23e7.
85. Id. § 2721.23f.
86. H. R. 11370, 90th Cong., 1st Sess. (1967).

87. Forest Service Manual §§ 2721.23b7-8 (Amend. No. 15, Jan. 1969), 2345.
88. Forest Service Handbook § 2713.50f (1958).
89. H.R. 4884, 90th Cong., 1st Sess. (1967). See also H.R. 740, 741, 1285, 3779, 3893, 4122, 4713, 5041, 8921, 9913, Id.
90. H.R. 12169, 91st Cong., 1st Sess. (1969).
91. Forest Service Manual § 2721.21 (Amend. No. 15, Jan. 1969).
92. Id.
93. 16 U.S.C. § 495 (1969).
94. 36 C.F.R. § 251.1(c)(2) (1968).
95. 16 U.S.C. §§ 1, 3, 462 (1964).
96. Recreation Areas, supra, n. 50.
97. 43 C.F.R. § 21.4(a) (1969).
98. Id. § 21.4(a)(3).
99. Id. § 21.4(b).
100. Id.
101. 43 C.F.R. §§ 2410.0-5(b) (1969).
102. Id. §§ 2410.0-5(c).
103. A list of commercial uses permitted by the Forest Service and detailed provisions governing various kinds of commercial uses are contained in Forest Service Manual §§ 2721.3-2721.64 (Amend. No. 15, Jan. 1969); a list of industrial uses permitted and detailed provisions governing various kinds of industrial uses are contained in Id. §§ 2724.1-2724.17. The Small Tract Act, 43 U.S.C. § 682a (1964) does not delineate permissible commercial uses, but by judicial decision it is clear that land may be sold or leased under this authority for commercial campsites; Blendena Maynard, Utah 017797 (May 6, 1958).

104. 16 U.S.C. § 20 (Supp. IV, 1969), 43 U.S.C. § 971 (1964), 16 U.S.C. § 495 (1964).
105. Except where transient use is unique, such as in areas deliberately kept in wilderness, there is no need for these special statutes or at least for more than one of them. Basic legislation applying to all lands used for commercial purposes to serve the transient public would be feasible, as would one basic statute setting forth policies to serve permanent residents with commercial facilities.
106. 42 U.S.C. § 2201(e) (1964).
107. 16 U.S.C. § 20 (Supp. IV, 1969).
108. Id. §§ 20-20(g).
109. Id. § 20.
110. National Park Service, Dep't of the Interior, Administrative Policies for Natural Areas of the National Park System 50 (1968) (hereinafter cited as Natural Areas); National Park Service, Dept of the Interior, Administrative Policies for Historical Areas of the National Park Service 55-56 (1968) (hereinafter cited as Historical Areas).
111. National Park Service, Dep't of the Interior, Administrative Policies for Recreation Areas of the National Park System 29 (1968) (hereinafter cited as Recreation Areas).
112. Natural Areas, supra note 11, at 61; Historical Areas, supra note 11, at 65.
113. Id.
114. Natural Areas, supra note 11, at 50.
115. 16 U.S.C. § 20b(c) (Supp. IV, 1969).
116. Id. § 20a.
117. Id. § 20c.
118. See, Id. § 20f.
119. Id. § 20e.

120. Id.
121. Id.
122. Id. § 20b.
123. Id. § 20e.
124. Id.
125. Id.
126. Id. § 20d.
127. 43 U.S.C. § 971 (1964).
128. 43 C.F.R. § 2321.1-4(a) (1969).
129. Id. § 2321.1-4(c)(6).
130. Id. § 2321.1-4(b).
131. Id. § 2321.1-4(c)(1).
132. Id. § 2321.1-4(c)(2).
133. Id. § 2321.1-4(c)(3).
134. Id. § 2321.1-4(4).
135. Id. § 2321.1-4(c)(4).
136. Id. § 2321.1-4(6).
137. Id. §§ 2321.1-4(6), (d), (f).
138. 16 U.S.C. § 495 (1964).
139. Id.
140. 42 U.S.C. § 2201(e) (1964).
141. 16 U.S.C. § 1131 et seq. (1964).

142. 36 C.F.R. § 251.75 (1969).
143. Forest Service Manual § 2720 (Amend. No. 15, Jan. 1969).
144. Id. § 2720.3.
145. Id. § 2720.3-6.
146. Id. § 2720.3-7.
147. Secretary of the Interior Hubert Work's Memorandum to Director, National Park Service Stephen T. Mather (March 11, 1925).
148. 16 U.S.C. § 1131 et seq. (1964).
149. Id. § 1133(d)(6).
150. 36 C.F.R. § 251.75 (1969).
151. 16 U.S.C. § 1133(c) (1964).
152. 36 C.F.R. § 251.75 (1969).
153. 16 U.S.C. § 580(d) (1964).
154. Forest Service Manual § 2711.33 (Amend. No. 12, Oct. 1968).
155. Sierra Club v. Hickel, (N.D. Cal., filed June 5, 1969), The Wall Street Journal, June 6, 1969, at 11, col. 1-2.
156. Memorandum of Decision dated July 23, 1969 in Sierra Club v. Hickel, No. 51464, District Court, San Francisco, California.
157. B.R. Instructions § 215.7.1 (July 26, 1957).
158. 36 C.F.R. § 311.16 (1969).
159. 16 U.S.C. § 3 (1964); 36 C.F.R. § 5.3 (1969).
160. 16 U.S.C. § 462 (1964).
161. 36 C.F.R. § 251.1 (1969).

162. 43 C.F.R. § 2236.0-2 (1969).
163. B.R. Instructions § 215.7.1 (July 26, 1957).
164. Forest Service Manual § 2712.1 (Amend. No. 12, Oct. 1958).
See discussion of National Park Service applicant requirements and preferences in discussion of Park Service concessioners.
165. Forest Service Manual § 2720.3 (Amend. No. 15, Jan. 1969).
This policy may lead other agencies to withdrawals if they desire to operate public facilities themselves.
166. 16 U.S.C. § 3 (1964).
167. Id. § 479 (1964), § 580(d) (1964).
168. 36 C.F.R. § 251.1(b)(3) (1969).
169. 43 C.F.R. § 2236.2-1 (1969).
170. 16 U.S.C. § 497 (1964), § 580(d) (1964).
171. Id.
172. Forest Service Manual § 2711.33 (Amend. No. 12, Oct. 1968).
See Discussion, supra at 11 concerning the Mineral King development.
173. 43 C.F.R. § 2236.0-7(a) (1969).
174. 16 U.S.C. § 580(d) (1964).
175. Forest Service Manual § 2711.3 (Amend. No. 12, Oct. 1968).
176. Forest Service Manual § 2713.44 (Amend. No. 12), Oct. 1968).
177. Blendena Maynard, Utah 017797 (May 6, 1958).
178. Forest Service Manual § 2713.32 (Amend. No. 12, Oct. 1968).
179. Id. § 2713.34.
180. 16 U.S.C. § 580(d) (1964).

181. Forest Service Manual § 2711.3 (Amend. No. 12, Oct. 1968).
182. 36 C.F.R. § 5.10 (1969).
183. Forest Service Handbook § 2713.80 (Amend. No. 106, July 1960).
184. Forest Service Manual § 2710.12a3 (Amend. No. 12, Oct. 1968).
185. Id. § 2715.06 (Amend. No. 12, Oct. 1968).
186. Id. § 2715.2.
187. Id. § 2715.41f.
188. Id. § 2721 (Amend. No. 15, Jan. 1969).
189. 43 C.F.R. § 2236.3 (1969).
190. 43 U.S.C. § 682a (1964).
191. 43 C.F.R. § 2233.3-1(b) (1969).

CHAPTER V

STATE AND LOCAL GOVERNMENT AND COMMUNITY
FACILITY RELATED USES

CHAPTER V

STATE AND LOCAL GOVERNMENT AND COMMUNITY FACILITY RELATED USES

I STATE AND LOCAL GOVERNMENT USES

A. Overview

This section focuses on provisions for the disposal and use and occupancy of Section 10 lands of special application to state and local governmental bodies and their respective subdivisions and agencies. It should be noted that while other discussions in this part focus on uses for particular purposes, this discussion focuses on the owner or user. Lands available to state and local governments for the particular uses discussed in the sections on transportation, utilities, and education, science and research are not discussed here. Those statutes which make lands available to governmental agencies exclusively are covered specifically, and the statutes of general applicability set out in chapter one are discussed with a view to pointing up the characteristics which they share in their treatment of state and local government bodies as opposed to private entities.

B. Statutes Providing Exclusively Or Primarily For State and Local Government Use

1. Public Buildings or Other Public Works

The Act of September 3, 1954 1/ authorizes the head of any department or agency of the United States Government having jurisdiction over public land 2/ and National forests (except National parks and monuments sites) to grant leases, permits, and easements for the construction and maintenance of public buildings and other public works. 3/

Such leases, permits, and easements may be granted to states, counties, cities, towns, townships, municipal corporations, and other public agencies, including local subdivisions of Governmental units when such subdivisions have authority to acquire an interest in land. 4/

The following provisions apply only to public lands under the direction of the Bureau of Land Management. 5/

Upon receipt of an application for an easement, or for a type of use which apparently could be provided for only by an easement, the

Adjudication Officer of the Bureau of Land Management will review the application in the light of the following criteria: easements will be granted:

- (1) If cases where the desired use could be provided for under the right-of-way regulations of 43 C.F.R. § 2234, if the applicant was qualified under those regulations;
- (2) in cases where the desired use is in the nature of a right-of-way even though that particular type of right-of-way (example: aerial tramway) may not be covered by the regulations of 43 C.F.R. § 2234;
- (3) in situations where the Bureau of Land Management wishes to and can retain freedom to dispose of the lands involved, subject to a reservation protecting their permitted use.6/

If it is determined that an easement could properly provide for the desired use, the Adjudication and Classification Officers will process the application in accordance with applicable portions of 43 C.F.R. § 2234 insofar as they do not conflict with 43 C.F.R. part 9 and the appropriate procedures except that the charge for an easement will be based upon the fair market value.7/

Upon receiving an application for a permit or a lease, the Adjudication Officer of the Bureau of Land Management ascertains the adequacy and correctness of the land description, determines the qualifications of the applicant, decides whether the proposed use meets the requirements of the Act, and then forwards the application and the completed status report to the Classification Officer for investigation and report. If it is determined that the land is and should be made available to the applicant, the Adjudication Officer will offer the applicant the permit or lease. The permit or lease will call for advance payments of the value of the permit or lease in accordance with the report of the Classification Officer.8/

Permits may be issued for the construction and maintenance of public works where the applicant does not need or desire control of the surrounding area or an easement.9/ A lease will be granted when the applicant must have control over a specific construction site or area for a specific term, subject to the terms of the standard lease, e.g. school house and grounds.10/

A lease, permit, or easement may be granted for up to thirty years in order to allow the grantee sufficient tenure of use to justify the expenditure of funds by state and local bodies for improvements of a permanent nature. However, the lease period will be kept to a reasonable minimum.11/ All leases, easements, and permits are renewable at the discretion of the authorized officer.12/

Rental for the lease, permit, or easement is to be based upon the fair market value of the property and is fixed by the head of the controlling agency or department through appraisal. Periodic payments or a lump sum payment, both payable in advance, will be required at the discretion of the authorized officer:

- (1) when periodic payments are required, the applicant will be required to make first payment before the lease, permit, or easement will be issued;
- (2) upon the voluntary relinquishment of such an instrument before the expiration of its term, any payment made for any unexpired portion of the term will be returned to the payer, upon proper application for repayment, to the extent that the amount paid covers a full permit, lease, or easement year or years after the formal relinquishment. The amount to be returned will be the difference between the total payments made and the value of the expired portion of the term calculated on the same basis as the original payments.13/

The terms and conditions of easements will be governed by the regulations of 43 C.F.R § 2234 (rights-of-way) insofar as they are applicable and insofar as they do not conflict with 43 C.F.R part 9.14/ Leases and permits will contain the usual terms and conditions required by law, public policy, and, insofar as possible, as the Classification Officer considers necessary to protect the public interest and public property.15/

A typical lease or permit contains the following provisions. The lessee or permittee is obligated to construct certain improvements upon the premises within a period of time set forth in the lease or permit.16/ The lessee or permittee may not assign his interest or change the land use without prior consent from the Bureau of Land Management.17/ All mineral rights are reserved to the United States.18/ and the lessee or permittee must take reasonable steps to protect the surface of the land and the natural resources and

improvements thereon. He may not cut timber without Bureau of Land Management permission. 19/

The Bureau of Land Management Classification Officer will undertake field examinations at reasonable intervals to ascertain compliance by the lessee with the terms and conditions of the lease. Examinations may be scheduled every five years or at greater or lesser intervals, at the discretion of the Classification Officer. In the event the authorized officer finds noncompliance with the terms of the lease, he will notify the Adjudication Officer. Failure to comply with the terms of the lease or to make timely payment will be cause for cancellation. 20/

2. Disposals for Public Parks, Public Recreation Areas, and Historic Monument Sites, 50 U.S.C. App. 1622(h)(i) (1964)

The Federal Property and Administrative Services Act of 1949 21/ continues in effect § 13(h) of the Surplus Property Act of 1944. Pursuant to this section, any disposal agency may, with the approval of the Administrator of GSA, convey to any state, political subdivision, instrumentalities thereof, or municipality surplus property which, in the determination of the Secretary of the Interior, is suitable and desirable for use as a public park, public recreation area, or historic monument for the benefit of the public. 22/

a. Method of Disposal. When excess Federal property is screened for the needs of other Federal agencies, notice of the availability of such property for the information of the Secretary of the Interior is to be sent to the office designated by the Secretary to serve the area in which the property is located. With the prior consent of GSA and on a case by case basis, the Bureau of Outdoor Recreation, Department of the Interior may at this point apprise eligible local public agencies of excess property peculiarly adaptable for use for public park, public recreation, or historic monument purposes.

When property has been determined surplus and available for public park or recreation uses, the disposal agency shall notify the Secretary of the Interior as of the date such determination becomes effective. 23/ Prior to taking any other disposal action, the disposal agency must give notice of the availability of such property to public agencies eligible to procure surplus property under the statutes listed in 41 C.F.R. § 101-47.4905 (1969), which include 50 U.S.C. App 1622(h),

and must allow an interested agency a reasonable time in which to develop a plan for the use and procurement of the property.24/

Whenever an eligible public agency has submitted a plan of use and an application to acquire the property for a public park, public recreation or historic monument purpose, copies of the plan and application are to be forwarded to the Director, Bureau of Outdoor Recreation, Department of Interior and to the appropriate field office of the Bureau of Outdoor Recreation. The Director shall inform the disposal agency of the date when the Secretary of the Interior's determination that the land is suitable and desirable for use as a public park, public recreation area, or historic monuments will be available.25/ Upon receipt of the Secretary's determination, the disposal agency may convey the property or an eligible public agency subject to the provisions of the Surplus Property Act of 1944.26/

b. Provisions Governing Disposal. The Surplus Property Act of 1944 provides that conveyances for public park and recreation purposes are to be made at a price equal to 50 percent of the fair value of the property conveyed, based on the highest and best use of the property at the time it is offered for disposal, as determined by the Administrator. Conveyances of property for historic monument purposes are to be made without consideration.27/

Conveyances under this authority shall provide that all property shall be used and maintained for the purpose for which it was conveyed for a period of not less than twenty years and may contain such other terms, reservations, restrictions and conditions as are determined necessary to safeguard the interest of the United States.28/ Authority is delegated to the Secretary of the Interior to determine and enforce all the terms and conditions of transfer, subject to the disapproval of the head of the disposal agency.29/

3. Reclamation Townsite Provisions

Special provisions apply to state and local governments under the townsite provisions of the reclamation Acts.30/ These provisions are discussed in the general discussion of the townsite laws and are not repeated here.31/

4. Fire Control Facilities, 16 U.S.C. § 565b

Fire control improvement (such as fire lookout towers and other structures such as dwellings and warehouses used for fire prevention or suppression purposes) and lands outside National forests used with the improvements can be conveyed to a state or one of its subdivisions that have assumed fire control responsibilities. 32/ The transfer is made if other criteria are met where the transferee needs title to the site to expend funds on maintenance, reconstruction or construction. 33/ There are no special preference rights or acreage limitations, but conditions are imposed for reversion of title if not used for fire prevention or suppression purposes. 34/ In addition, rights-of-way, mineral rights and entry permits and rights to collect and retain rents are reserved; 35/ other reservations and conditions can also be imposed.

When the transfer involves Forest Service administered public domain land, the Bureau of Land Management is requested to give general advice, indicate other agencies that may have jurisdiction or rights, disclose rights or privileges under public land laws and suggest reservations needed by Bureau of Land Management to protect the public interest. 36/

Unless the fair market value is less than \$100 or the National forests continue to benefit substantially, the transfer is made at fair market value, 37/ on the basis of appraised value which can be discounted up to 20 per cent because of the restrictions on title. 38/

5. Buildings Supplanted By New Structures, 40 U.S.C. § 345b

Buildings which have been supplanted by new structures and their sites, for which there is no further Federal need, can be disposed of for public use by the Administrator of General Services under 40 U.S.C. § 345b. Disposal is only to state and political subdivisions. The statute does not mention any preference rights, acreage limitations or conditions, however, the Administrator's discretionary authority to sell these lands includes an express authorization to prescribe terms rules and regulations covering the disposal. The total purchase price must not be less than 50 per cent of the appraised value of the land. Installment payment is permitted within the discretion of the Administrator and he may waive interest.

C. Statutes of Broad Applicability

For a general discussion of the statutes of broad applicability which provide for the disposal or lease and occupancy of Section 10 lands, see chapter III. The following discussion will point up the general characteristics of these statutes when disposal to or use and occupancy by state and local governments is contemplated and make specific reference to these statutes only by way of illustration.

For the most part whenever land is made available to private persons and organizations under the statutes of broad applicability, it is made available to governmental agencies as well. The major exceptions are those statutes which contemplate an exclusively proprietary use being made of the land and which prefer resident occupiers or adjoining resident landowners. For example, lands on reclamation projects which are too small to support a farm unit 39/ or are unproductive 40/ are available only to resident owners and resident entrymen. Similarly, while the statute authorizing the establishment of townsites by occupant platting contemplates disposal to citizens and corporations only, 41/ a preference right to purchase at the minimum price is accorded any actual settler. 42/

The statutory pattern is rather to favor than to discriminate against state and local governments. Lands are available under the Recreation and Public Purposes Act of 1926 43/ and small tracts are available for community sites under the Small Tract Act. 44/ only to governmental bodies and nonprofit corporations. Under the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 471 et seq., (1964) public agencies are given a first opportunity to acquire surplus Government property under the statutes specified in 41 C.F.R. § 101-47.4905 (1969). Also, only Government agencies and nonprofit corporations are eligible to apply for surplus property which the Administrator of GSA has assigned to the Secretary of HEW for disposal for education and public health purposes. 45/ As to lands acquired under the Bankhead-Jones Act, sales, exchanges and grants can be made only to public authorities and agencies, whereas use and occupancy is available to others. 46/

These expressions of preference are consistent with regulations under the Classification and Multiple Use Act of 1964. 47/ Land may be classified for retention if such classification will, among other things, preserve public values that would be lost if the land passed from Federal ownership, such as where the lands should be retained in Federal ownership pending their acquisition by a state or local government. 48/

Further, the general pattern is to grant governmental agencies preferences with respect to tenure, acreage and price.

With respect to tenure, for example, leases on reclaimed lands for recreation or concession development are generally limited to five years but may be longer if granted to a state or local government agency.^{49/}

Similarly, larger acreages may be obtained by state and local governments. For example, under the Forest Service townsite provisions,^{50/} private parties are limited to three town lots; this restriction does not apply to public agencies.^{51/} Again, sites may be made available for occupancy to serve settlers who live in or near a National forest: two acres are made available for school whereas only one acre is available for churches.^{52/}

Price preferences are also typical. For example, under the Public Land Sale Act of 1964, ^{53/} disposal to state and local government bodies is at the appraised fair market value of the lands rather than at the higher of competitive bid price or appraised fair market value.^{54/} While conveyances or leases under the Recreation and Public Purposes Act ^{55/} are usually made at appraised prices, land is conveyed to a state or locality for historic monument purposes free of charge, ^{56/} and special pricing programs are available to states, their subdivisions and instruments for specified public uses.^{57/}

It should be noted that when land is made available to state and local governments at a reduced cost, the statute normally contemplates that the land will be used for a public purpose and frequently provides that the interest granted shall terminate if the land ceases to be used for the purpose for which it was granted. Perhaps the sole exception is the Public Land Sale Act of 1964; ^{58/} while a price preference is accorded state and local governments, the statute itself provides that evidences of title shall contain no restriction to insure proper development of the lands after they have passed from Federal ownership. ^{59/}

II COMMUNITY FACILITY RELATED USES

A. Cemetery Sales Act of 1907

While this discussion of community facility related uses does not consider each type of community facility related use separately, there is one statute, the Cemetery Sales Act of 1907 ^{60/} which provides exclusively for a particular kind of community facility. The separate statutory base justifies individual discussion.

The Act authorizes the Secretary of the Interior to sell any unreserved, surveyed, nonmineral public lands 61/ for cemetery purposes. 62/ Noncontiguous tracts are not subject to entry by the same applicant. 63/

Eligible purchasers under the Act include religious or fraternal associations or private corporations, empowered by the laws under which they are organized or incorporated to hold lands for such purposes. 64/ No association or corporation may secure title to more than eighty acres of land. 65/ The purchase price is fixed at the appraised fair market value of the lands, but no lands may be sold for less than \$1.25 per acre. 66/

The full purchase price must be paid before the patent will issue. 67/ And title to the lands sold will revert to the United States should any part of the lands sold cease to be used for cemetery purposes. 68/

B. Statutes of Broad Applicability Permitting Community Facility Related Use

1. Overview

The following statutes provide for the disposal and lease of public lands for various purposes, among which may be included disposal for community related purposes.

43 U.S.C. §§ 711-731 (1964) authorize the establishment of townsites and the sale of lands therefrom. Secretary of the Interior.

43 U.S.C. § 561 (1964) authorizes the establishment of townsites from reclamation lands and the sale of lands therefrom. Secretary of the Interior.

7 U.S.C. § 1012a (1964), 16 U.S.C. § 478a (1964) authorize the establishment of townsites on National forest land and the sale of lands therefrom. Secretary of Agriculture.

43 U.S.C. § 682a (1964) authorizes the sale or lease of small tracts which the Secretary of the Interior may classify as chiefly valuable from community sites among other purposes. Secretary of the Interior.

43 U.S.C. § 1171 authorizes the sale of isolated and mountainous tracts without limitation as to purpose. Secretary of the Interior

The sale of lands acquired in connection with irrigation projects, 43 U.S.C. § 374 (1964), lands improved at the expense of the reclamation funds, 43 U.S.C. §§ 375-375f (1964) and unproductive lands, 43 U.S.C. §§ 424-424a (1964) is authorized without limitation as to purpose. Secretary of the Interior.

Public lands classified for disposal may be sold under 43 U.S.C. § 1421 (1964) pending Public Land Law Review Commission recommendations if required for the orderly growth of a community or if chiefly valuable for a number of purposes. Secretary of the Interior.

Clearly, a community facility related use can be a public purpose for which sales or leases are authorized by the Recreation and Public Purposes Act of 1926, 43 U.S.C. § 869(a) (1964). Sales or leases are made only to governmental or nonprofit bodies. Secretary of the Interior.

Finally, 40 U.S.C. § 471 et seq. establishes a system of utilizing and disposing of surplus Federal property, including lands. General Services Administration.

The general discussion of these statutes found in Chapter III should be referred to: other than the special provisions of the Small Tract Act 69/ pertaining to community sites, which will be discussed herein, there are no provisions which are of particular application to use of the land for community facility related purposes.

In addition to the statutes authorizing the disposal and lease of public lands, the following statutes permit the use and occupancy of forest lands and constitute the authority under which the Forest Service issues permits for community uses.

16 U.S.C. § 551 (1964) authorizes the Secretary of Agriculture to regulate the use and occupancy of the National forests. This is the basic authority for issuing terminable special use permits. 70/

16 U.S.C. § 580(d) (1964) authorizes the Secretary of Agriculture to permit the use of structures or improvements under the administration of the Forest Service and the land used in connection therewith. 71/

16 U.S.C. § 497 (1964) authorizes the Secretary of Agriculture to permit the use and occupancy of National forest lands for several kinds of uses, including "constructing or maintaining buildings, structures, or facilities necessary or desirable for education or for any public use or in connection with any public activity."

43 U.S.C. § 931c, d, authorize the head of any department or agency having jurisdiction over public lands and National forests to grant permits, leases or easements for the purpose of constructing and maintaining on such lands public buildings or other public works.

2. Discussion

The following discussion will focus on the special provisions applicable to the issuance of permits for community facility related uses by the Forest Service and the special provisions governing the sale and lease of community sites under the Small Tract Act 72/ administered by the Bureau of Land Management. Community facilities owned by state and local governments are not included since state and local government uses are discussed separately. Further, special provisions which apply to individual community facility related uses are not detailed.

The Forest Service issues special use permits 73/ for community uses. 74/ Community uses are defined as those which provide services, facilities or housing for persons living in urban or rural areas where a dependence on National forest lands exists. The boundaries of such communities are often ill-defined and may involve persons living on National forest as well as on private land. 75/ Included under the community title are such community uses as cemetery, church, disposal area, garbage and trash dump, sewage disposal, firehouse, fire tower, hospital and sanitarium, residences of a community nature, Government-owned building, school, service building and shelter uses. 76/

Permits for the construction and maintenance of community improvements may be issued to persons who occupy National forest lands for summer home or other residential purposes not connected with timber sales, grazing permits, or water power developments and who have organized an association for community improvement. 77/ A sample constitution and by-laws for associations formed to provide community facilities 78/ indicates that associations are concerned with such matters as water and sewage systems, garbage collection, police protection, fire protection and aiding the enforcement of Forest Service regulations with regard to sanitation, fires, public health, recreation and other

purposes.^{79/} Permits for community facilities are issued to associations in which all permittees of like character within the area are eligible for membership.^{80/} The association must show that its agreements are binding on members, and an advisory board must similarly be able to bind the permittees it represents. The association or the advisory board must be able to show that it represents a majority of the permittees occupying land for like purposes in the area.^{81/} However, permittees cannot be compelled to join or to pay dues to an association formed to provide community improvements.^{82/} Except for these residence-related uses, permits for community uses are generally issued to a governmental or public agency or a nonprofit organization providing a public service.

Only nonprofit corporations or associations, states, municipalities and other governmental subdivisions can lease or purchase lands for community site purposes under the Small Tract Act.^{83/}

Forest Service permits for community uses may be issued under the Term Permit Act of 1915 ^{84/} for a nominal charge.^{85/} By regulation, the Chief of the Forest Service may authorize the issuance of a special use permit without charge when the use is by a Governmental agency, of a public or semi-public nature, for noncommercial purposes, in connection with an authorized utilization of National forest resources, or of benefit to the Government in the administration of the National forests, or for similar purposes compatible with the public interest.^{86/} However, if the use qualifies under this regulation to be without charge, an annual permit will be issued.^{87/} For example, annual permits are issued, free of charge, to associations formed by recreation residence permittees for the purpose of constructing community improvements.^{88/} If improvements under the administration of the forest service are to be used and maintenance costs will be a part or all of the charge, a term permit under the Granger-Thye Act ^{89/} will be issued. If the area under permit exceeds eighty acres, the Term Permit Act of 1954 ^{90/} will be used.^{91/} Such permits are available only to governmental bodies; a fee equal to the fair market value ^{92/} (5 per cent of the appraised fair market value of the land under permit)^{93/} will be charged; and the permit will terminate if the lands cease to be used for the purpose for which the permit was granted.^{94/}

Appraisals for the sale or rental value of land for community sites under the Small Tract Act ^{95/} may take into consideration the use which is to be made of the land where the public use contemplated justifies such action. Where lands are sold for less than their fair market value, the

patent is to contain a provision for reversion of title to the United States if the lands are used for any purpose not consistent with the classification order after the patent has issued unless consent to the change in use is obtained in advance.96/

Footnotes

1. 43 U.S.C. §§ 931c-d (1964).
2. Including the Oregon and California revested railroad grant land, the Coos Bay Wagon Road lands, and other acquired lands under Bureau of Land Management control.
3. 43 U.S.C. § 931c (1964); 43 C.F.R. § 9.1 (1969); 5 Bureau of Land Management Manual § 3.15.4 (Release 136, July 28, 1958).
4. Id.
5. The chief . . . other public works. 36 C.F.R. § 251.1(c)(4) (1969).
6. 5 Bureau of Land Management Manual § 3.15.5A (Release 136, July 28, 1958).
7. Id. § 3.15.25; 43 C.F.R. §§ 9.1-7 (1969).
8. 5 Bureau of Land Management Manual §§ 3.15.8-13, 26-27 (Release 136, July 28, 1958).
9. Example: limited term warehouse site, Id. § 3.15.5C.
10. Id. § 3.15.6B.
11. Id. § 3.15.14B; F.S. Manual § 2701.1 (Amend. No. 12, Oct. 1968) H.R. Rep. No. 2243, 83d Cong., 2d Sess. (1954).
12. 43 C.F.R. § 9.3(b) (1969).
13. Id. § 9.3(c).
14. Id. § 9.5.
15. Id. § 9.6(a).
16. The Chief, Forest Service is authorized to issue permits, leases, and easements to states, counties, cities, towns, townships, municipal corporations, and other public agencies for periods not in excess of 30 years, at prices representing

the fair market value, fixed by the Chief, Forest Service, through appraisal, for the purpose of constructing and maintaining on such lands public buildings or other public works. 36 C.F.R. § 251.1 (c) (4) (1969).

17. 43 C.F.R. § 9.3(b) (1969).
18. *Id.* § 9.3(a).
19. 5 Bureau of Land Management § 3.15 Illustrations 1, 4 (Release 136, July 28, 1958).
20. *Id.* § 3.15.15.
21. 40 U.S.C. § 473 (1964).
22. 50 U.S.C. § 1622(h)(1) (1964).
23. *Id.* § 101-47.204-1.
24. *Id.* 101-47.303-2.
25. *Id.* 101-47.308-3(d).
26. *Id.* § 101-47.308-3(e).
27. No property shall be considered suitable or desirable for use as a historic monument in this regard except in conformity with the recommendations of the Advisory Board on National Parks, Historic Sites, Buildings, and Monuments. Further, no property shall be considered suitable or desirable for such use of its area exceeds that necessary for the preservation and proper observation of the monument situated thereon or its historic significance relates to a period of time within 50 years immediately preceding the determination of suitability for such use. 50 U.S.C. App. 1622(h)(2) (1964).
28. *Id.* § 1622(h)(3).
29. 40 U.S.C. § 484(k)(2)(C) (1964); 41 C.F.R. § 101-47.308-3(f) (1969).
30. 43 U.S.C. § 561-473 (1964).
31. See general discussion, ch. III, disposal statute overview, supra.

32. Forest Service Omnibus Act of June 20, 1958, 16 U.S.C. 565b (1964); F.S. Manual § 5481.5-1 (Amend. No. 135, Oct. 1965).
33. Id. § 5481.5-2b(2).
34. Id. § 5481.52d(1).
35. Id. § 5481.5-2d.
36. Id. § 5481.53.
37. Id. § 5481.5-2a.
38. Id. § 5481.5-2c.
39. 43 U.S.C. § 375c (1964).
40. Id. § 424.
41. 43 C.F.R. § 2242.0-6 (1969).
42. 43 U.S.C. § 713 (1964).
43. Id. §§ 869, 869-4 (1964), as amended, (Supp. IV, 1969).
44. Id. § 682a.
45. 40 U.S.C. § 484(k)(1)(A), (B) (1964).
46. 7 U.S.C. § 1011(c) (1964).
47. 43 U.S.C. §§ 1411-1418 (1964), as amended, (Supp. IV, 1969).
48. 43 C.F.R. § 2410.1-2(c)(3) (1969).
49. B.R. Instructions § 215.5.5. (July 2, 1959).
50. 16 U.S.C. § 478a (1964).
51. F.S. Manual §§ 5481.41-42 (Amend. No. 135, Oct. 1965).
52. 16 U.S.C. § 479 (1964).
53. 43 U.S.C. § 1421 (1964).

54. 43 C.F.R. § 2243.2-1(a) (1969).
55. 43 U.S.C. § 869(a) (1964).
56. Id. § 869-1 (Supp. IV, 1969); 43 C.F.R. § 2232.2-3 (1969); Bureau of Land Management Manual § 2232.23B4 (Release 2-23, Aug. 2, 1966).
57. See 43 U.S.C. § 869-1 (Supp. IV, 1969) (dealing with special pricing programs).
58. Id. § 1421-1427 (1964), as amended, (Supp. IV, 1969).
59. Id. § 1424 (1964).
60. 43 U.S.C. § 682a (1964).
61. Lands subject to § 7 of the Taylor Grazing Act of 1934 are not available for disposal under this Act until classified by the Secretary of the Interior as suitable for cemetery purposes and not needed for any other public purpose or higher use.
43 C.F.R. § 2231.1(b) (1969).
62. 43 U.S.C. § 682 (1964); 43 C.F.R. § 2231.0-3 (1969).
63. J. B. Pitaval, 40 L.D. 74 (1911).
64. 43 U.S.C. § 682 (1964); 43 C.F.R. § 2231.0-3 (1969).
65. 43 C.F.R. § 2231.1(a) (1969).
66. Id. § 2231.3(a).
67. Id.
68. 43 U.S.C. § 682 (1964); 43 C.F.R. § 2231.1(d) (1969); See F.S. Manual § 2723.11 (Amend. No. 15, Jan. 1969) on use of lands for cemeteries by permit.
69. 43 U.S.C. § 682a (1964).
70. F.S. Manual § 2701.1 (Amend. No. 12, Oct. 1968).

71. Section 7 of the Granger-Thye Act, 64 Stat. 84 (1950).
72. 43 U.S.C. § 682a (1964).
73. 36 C.F.R. § 251.1 (1969).
74. F.S. Manual § 2723 (Amend. No. 15, Jan. 1969).
75. Id. § 2723.1.
76. Id. §§ 2723.11-19.
77. 36 C.F.R. § 251.8 (1969).
78. F.S. Manual § 2718.1-1 (Amend. No. 12, Oct. 1968).
79. See also the definition and scope provisions of this discussion.
80. 36 C.F.R. § 211.1 (1969).
81. Id. § 211.1(a).
82. F.S. Manual § 2718 (Amend. No. 12, Oct. 1968).
83. 43 C.F.R. § 2233.0-2(b) (1969).
84. 16 U.S.C. § 497 (1964).
85. F.S. Manual § 2723.1 (Amend. No. 15, Jan. 1969).
86. 36 C.F.R. § 251.2 (1969).
87. Under the authority of 16 U.S.C. § 551 (1964) F.S. Manual § 2723.1 (Amend. No. 15, Jan. 1969).
88. F.S. Manual § 2718 (Amend. No. 12, Oct. 1968).
89. 16 U.S.C. § 580(d) (1964).
90. 43 U.S.C. §§ 931c, 931d (1964).
91. F.S. Manual § 2723.1 (Amend. No. 15, Jan. 1969).

92. Five per cent of the appraised fair market value of the land under permit.
93. F.S. Manual § 2723.1 (Amend. No. 15, Jan. 1969).
94. 43 U.S.C. § 931c (1964).
95. Id. § 682a.
96. 43 C.F.R. § 2233.7 (1969).

CHAPTER VI
EDUCATION, SCIENCE AND RESEARCH USES

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EDUCATION, SCIENCE AND RESEARCH USES

I. THE EXISTING SYSTEM

A. Scope

Like other use-oriented sections of this report, these materials look to the specific statutory provisions for the mentioned uses and then refer to the general legislation, already detailed above, as it applies to these uses. Some introductory discussion is in order, however, because of the necessity of limiting the scope of this discussion. This necessity exists because of the breadth in the concept of education as a function of land use. Taken literally, this use category would easily encompass the whole of the National Park System and that of the national forest congeries, both of which have among their prime functions that of a generalized education of the public they serve.^{1/}

In addition to this diffuse educational function, however, public lands may be opened for more direct and intense yields of educational, scientific and research-related sort; public lands may be made available for schools, or serve as the base and possibly as the objects of specific research activities under appropriate circumstances. While the distinction is far from a perfect one, it is to this sort of activity that this section is addressed.

B. Specific Provisions

1. Overview

The category of "education, science and research uses," as limited for these purposes, tends to reduce down to three relatively distinct types of land use. The first case involves public lands as a general, often fungible resource, only indirectly related to the educational or scientific activity for which it is to be employed; the land is the situs not the focus of the activity. Typical uses of this sort are schools, observatories, and weather stations. The second subcategory concerns public lands which have acquired historical, archaeological or palen-tological importance; as such they are valuable as objects of research directed at past events and past social and organic circumstance. The third area encompasses research, study and analysis of the extant, ongoing resources and environment of the public lands in question.

These are differences in priorities and burdens which merit treating these three components of this use area separately.

Some general observations should be made, though. Uses in this category understandably assume rather high priority among the uses to which public land may be put. This priority is manifest in a number of ways. Access to public lands for such uses is to some extent guaranteed. By explicit policy or directive they are often given preference over competing or conflicting uses. Compensation requirements are often reduced or even eliminated. Elements of the public lands which made them attractive for such uses are among the criteria of selection of public lands in the first place, and are in many instances protected from destruction or erosion.

In view of this priority, it is somewhat surprising that rather few specific statutory provisions cover these uses. Apparently, this circumstance derives from the very fact of the obvious claim on the use of public lands which research and educational uses have. Thus, while schools are seldom mentioned in the legislation, they obviously play an important part in the many general statutes authorizing grants for interests in land for "public purposes" and the like. Similarly, outside research into matters of conservation, is so implicit in a number of public land use provisions as to go essentially unspecified, or at most, receives passing mention.

Whatever its cause, the paucity of specific statutory materials has suggested a slightly different emphasis in this use section. Where the education, science or research uses are explicitly referred to, in statutes, regulations or policy directives, they are treated in this portion on specific provisions. This is so even where the statutory reference may be part of a much broader legislative scheme, or when a regulation or policy derives its authority from a very general statute. The "general provisions" portion of this section deals with provisions which do not refer to these uses specifically, but which delineate categories within which they fall.

2. Situs Uses

Public lands may be valuable as a place to discharge educational and scientific functions without in themselves being the object of research or study. The classic case, of course, is the use of public land for the location of a school.

a. Schools. While most statutory authorization is of a general nature, there are some specific provisions concerning schools. Under 16 U.S.C. § 479 2/ the Secretary of Agriculture is directed to make available, without charge, two acres of land to the settlers on or adjacent to national forest land. Because the category of "actual settlers" has been strictly defined, 3/ the Forest Service considers it very "unlikely" that any group would qualify for this free use permit. 4/ 16 U.S.C. § 551 (1964) is more promising. It is without restriction of acreage and is not limited by the "actual settler" standard. While it requires that a charge be made for the permitted use, the Forest Service has sought to fix such fees at the "nominal" level of 3 percent of the appraised fair market value per annum. 5/ In the rare case where a group wishing to establish a school on national forest lands does qualify for free lands under § 479 but wants more than the allotted two acres, the Forest Service takes the position that a fee must be paid for all the acreage, without an exemption for the two acres of that section. 6/ The basic problem of § 551 is not monetary however; it is that only revocable permits are available. Presumably, the capital investment involved in establishing a school makes the security of a term permit far more desirable than one revocable at will.

§ 497 of Title 16 U.S.C. provides for term permits not exceeding thirty years in duration for educational facilities. Permits under this section may not exceed eighty acres. The Forest Service charges at the same 3 percent annum rate for lands made available under this section. 7/

Parcels of more than eighty acres, secured by a term permit, are available only under the broad grant of authority in 43 U.S.C. § 931(c) 1964). 8/ These permits are required by the statute to be compensated at fair market value, which has been interpreted by the Service as 5 percent fair market value per annum. 9/ The Forest Service takes a dim view of permits under this provision and will very seldom exercise its authority to grant them. 10/

The general criteria by which the Forest Service exercises the authority which comes to it through the Secretary of Agriculture under these provisions are two; the site requested must be the "most logical" site for the particular school, and must present no "serious conflicts with management plans." 11/ As a general matter, serious consideration of the possibility of land exchanges in lieu of cash payments is urged. 12/

Apparently, lands for school purposes are available to private, nonprofit enterprises as well as municipal corporations and other public entities.^{13/} This is not true, however, of the exceptional circumstance in which a term permit involving more than eighty acres is issued, as 43 U.S.C. § 931(c) (1964) is limited to public grants.

Specific statutory authorization is also made for schools within reclamation town sites. Authority, of course, is vested in the Secretary of the Interior and through him, in the Bureau of Reclamation. The legislative provisions appears in 43 U.S.C. § 570 (1969) (the 1919 Act), and the regulatory material is in 43 C.F.R. § 2242.5 (1969) and Bureau of Reclamation Instructions § 215.11(c) (July 26, 1957). Under these provisions, the officers of a school district which includes a reclamation town site may take title to a maximum of six acres within that town site. Application is to be made to the manager of the land office, who will issue a certificate of entry if the requisite conditions are met and the Bureau of Reclamation reports favorably upon the application. Basically, the school district must demonstrate:

- (a) that the land applied for is unreserved, unappropriated and undisposed;
- (b) that it is needed for the district's use;
- (c) that the district is duly organized under the laws of the state and entitled to hold property as a corporation, and;
- (d) that the school district's use of the land will not in any way interfere with the reclamation project. Title under these provisions is defeasible, and reverts back to the United States should it no longer be used for school purposes.

The Federal Property and Administrative Services Act ^{14/} also makes specific reference to school uses. Under 40 U.S.C. § 484(k)(1)A and (k)(2), the Administrator is authorized to assign surplus property to the Secretary of Health, Education and Welfare for "disposal" related to "school, classroom or other education use." While the disposal is subject to the Administrator's veto, ^{15/} there are no other substantial inhibitions upon the nature or duration of the interest of which the Secretary may dispose. ^{16/}

Similar provision for assignment of surplus property to the Secretary of Health, Education and Welfare is by regulation made a part of the Bureau of Reclamation's charge. ^{17/}

A very specialized case of specific provision for schools on federal public lands is presented by the placement of school facilities on military bases. Under 20 U.S.C. § 640 (Supp. IV, 1969) the United States Commissioner of Education is authorized to provide for the construction of such schools, where the local situation is such that free public education would not otherwise be available to the children of the military and civilian personnel stationed on the base in question. In turn, the several branches of the military establishment have generated procedures and criteria for the initiation and processing of permits to the Commissioner for the discharge of this authority. The Department of the Navy provides a good example of this pattern.

The procedure for establishing a school on a Navy installation subsumes two distinct processes. One is the granting of a permit to the Commissioner of Education and the other is the decision to have such a school, its design, its conformity to, and possible integration with, ongoing state and local public education, and its approval and support by the Commissioner of Education. The complex process described in the Navy regulations^{18/} is primarily addressed to this latter set of problems. The question of land use permission is quite straightforward. Basic authority over the granting of such permits vests in the Chief of the Bureau of Yards and Docks. The local officer responsible for forwarding the request is the District Public Works Officer. The criteria for granting such a request are simple:

- (1) there is need for a school building on what is presently Navy property;
- (2) it is impossible or undesirable to convey an adequate leasehold interest in the required property,^{19/} and;
- (3) the use does not conflict with more important federal purposes (this is nowhere stated, but while education is important, presumably this limitation is implicit in the grant of authority).

The permits thus issued are to provide that premises are solely for school uses and will terminate when the need or use terminates; that utilities, maintenance and related facilities are to be paid for by permittee, whether local or federal,^{20/} and that there be no racial or religious segregation. These permits are free, and without specific area or duration limitations.

More generally, military departments may lease land for public school use whether related to military dependents or not. Broad authority for leasing is contained in 10 U.S.C. § 2667 (1964). The lands covered by this legislation are those which are not needed by the Department for the time and which are not surplus or excess lands under the Federal Property and Administrative Services Act of 1949.21/ While § 2667 refers to virtually any sort of lease, it specifies certain waivable requirements, chiefly, a limitation of five years duration and a rental charge; it is in the context of waiver that school uses typically enjoy specific regulatory mention. The statute provides for what amounts to a waiver upon a determination by the respective Department Secretary that such use will promote the national defense or otherwise be in the public interest.22/ The Air Force's use of this statutory provision is instructive as regards school facilities.

Air Force directives on this matter are contained in Order of the Secretary of the Air Force, No. 703.5 (May 3, 1962). In that order, public school and public civil defense uses are uniquely favored in that authority is given for viewing the state or its political subdivisions as satisfying all or part of their rental obligations by their "maintenance, protection, repair, or restoration" of the leased property. Save for telephone companies' servicing the government under a special program, all other uses must pay at cost the appraised fair market rental value of the property. Public schools are also singled out in the Air Force order as potential recipients of leases up to 25 years in duration, a privilege which necessitated the Secretary's prior determination that in the case of public schools such a deviation from the statutory five year maximum was promotive of the national defense or within the public interest. Under the order, authority is delegated by the Secretary to the Director and Assistant Director for Civil Engineering Operations, with provision for successive redelegations to and within the Corps of Engineer. The basic criteria is that the lease be consistent with extant policies and operations of the Department.

b. Other Situs Uses. There are situs uses other than schools; typically, the public land in question may be especially valuable as a location for the use, but still not in itself be the object of research. Thus Forest Service directives expressly provide for observatories,23/ rain gauges,24/ weather stations^{25/} and cloud-seeding devices.26/ In each case, free use permits may be issued if the use qualifies for such free permits under 36 C.F.R. § 251.2 (1969). Failing this, an annual minimum fee of \$25.00 is to be levied. In addition, in the case of cloud seeding devices, the permit is to include a specific clause purporting to indemnify the United States government from any damage claims growing out of the seeding activity.27/

3. Historical Research and Study Uses

Statutory and regulatory provision for uses of public lands which relate to those lands of particular historical, archaeological or paleontological interest, is considerably more detailed than the situs use pattern just examined. Three statutes form the legislative foundation: The Antiquities Act of 1906,28/ The Historic Sites Act of 1935,29/ and the National Historic Preservation Act of 1966.30/

These Acts appear to have essentially three sorts of goals:

- (1) to identify, and to promote public and scholarly familiarity with the existence of objects of historical importance on public lands;
- (2) to open the public lands to, and encourage, bona fide research and study of, and public exposure to, such objects, and;
- (3) to protect such objects from destruction.

Of these three, it is the second which concerns us here, and it is this part of these legislative formulations which will be addressed.

The Antiquities Act of 1906 authorized the Secretaries of the Interior, Agriculture, and the Army to grant permits for the examination of ruins, excavation of archaeological sites and gathering of objects of antiquity. These permits are to be issued to "properly qualified institutions" for the benefit of "reputable museums, universities, colleges or other recognized scientific or educational institutions" with a view to increasing knowledge or preservation of such materials in public museums.31/ Pursuant to F.S.M. Manual § 2710.11a (Amend. No. 12, Oct. 1968), such permits are to be granted on an annual basis.

Under the Historic Sites Act of 1935, the Secretary of the Interior, acting through the National Park Service, is empowered to enter into contracts and "cooperative agreements" with states, municipalities, private entities and individuals, to operate historic or archaeologic buildings, sites or the like, for the purpose of making them available to the public. This power applies to lands within or without federal ownership, and is limited only by the stipulation that no such contract or agreement can, in the absence of prior Congressional approval, purport to obligate the general fund of the Treasury. As regards federal public lands, the Act further authorizes the Secretary to grant concessions, uses and permits where such grants further the ends of public availability.32/

The National Historic Preservation Act of 1966, as its name implies, is addressed primarily to the protection of sites of historic consequence. Its effect on the use of federal lands is thus essentially negative; federal departments and agencies are required to take into account the impact on these sites when undertaking, assisting, or licensing any project.^{33/} The only effects on historic research uses of the public lands wrought by the Act are incidental. The Act authorizes the Secretary of the Interior to expand and maintain the National Register of various objects, sites, etc. of historical, architectural, archaeological or cultural significance, and further, to grant funds to states for the purpose of preparing statewide historic surveys.^{34/} Presumably, in practice, this provision may dislodge some additional research activities undertaken on federal public lands. In addition, the Act authorizes the Secretary to accept governmental, institutional or individual assistance in advancing the Act's ends; it is entirely possible that in accepting such assistance the Secretary could and would open public lands for study and research by qualified individuals.^{35/}

In sum, the Antiquities Act of 1906 is the basic legislative provision aimed at special research access to historic sites; the 1935 and 1966 statutes are more directed to the broad public exposure, and affect research uses, if at all, secondarily.

Consonant with these three acts are provisions within broader legislature schemes. The National Park Service legislation includes provision for the Secretary of the Interior granting historical sites with national parks to state and local governmental entities.^{36/} Among the provisions for diminished cost disposals of public land to municipal entities under the Surplus Property Act of 1944 is specific contemplation of historic monuments;^{37/} that Act also authorizes gratis transfers of such sites to the Secretary of the Interior.^{38/}

This statutory pattern -- and particularly the Antiquities Act -- is amply buttressed by regulation. 43 C.F.R. 3.1 et seq. (1969) sets out basic standards for the administration of sites of archaeological and historical importance. Jurisdiction is divided along essentially standard lines, with the Secretary of Agriculture's authority extensive over forest reserves, the Secretary of Army over military reservations, and the Secretary of the interior over other lands owned or controlled by the government of the United States. In addition basic standards of decision are set out here: no removal grants, no exclusive permits, a repetition of the Antiquities Act's limited class of beneficiaries of grants and permits, and so forth.

36 C.F.R. § 251.1(c)(1) (1969) in turn authorizes the Chief of the Forest Service to issue permits for the examination of ruins, excavation of archaeological sites, and gathering of objects of antiquity. This delegation from the Secretary to the Chief of the Forest Service is facilitated in the F.S. Manual, §§ 2726.11-11b (Amend. No. 15, Jan. 1969). The necessity for close control of research which, poorly undertaken, could destroy or mutilate its irreplaceable object, is reflected in the detailed procedure which is set out in the Manual.

The applicant must be a reputable institution, as detailed in the Antiquities Act.^{39/} His application,^{40/} prepared in sextuplicate, passes from the Ranger to the Forest Supervisor to the Regional Forester to the Washington Office of the Service. At each stage there is occasion for review and recommendation, but primary responsibility for applying the substantive requirements of F.S. Manual § 1530.12 (Amend. No. 123, Nov. 1964)^{41/} devolves on the Forest Supervisor and, presumably, the Ranger is responsible for reporting and evaluating the local situation. This puts the Ranger in a role like a trier of fact in a legal system, and treats the Forest Supervisor as an applier of law. The Regional Forester seems to be essentially a conduit. After reaching the Washington Office, approval of the Smithsonian Institute is required; if granted, a terminable permit is prepared, and sent back down the line.^{42/}

The Bureau of Land Management also has rather detailed instructions concerning the management of antiquities; they appear in § 6231 of the Bureau of Land Management Manual (Release 6-2, Sept. 3, 1964), as amended, (Release 6-4, Aug. 4, 1964). Essentially three sorts of problems are addressed by the instructions:

- (1) the desirability of conveying lands which contain significant antiquities to other Federal agencies, or to state or local entities;
- (2) the protection of antiquities which may be threatened by the conveyance of Bureau of Land Management lands or rights-of-way on those lands; and
- (3) the provision for research on Bureau of Land Management lands.

Under the Recreation and Public Purposes Act, ^{43/} Bureau of Land Management transfers to state or local governments or to appropriate nonprofit organizations or institutions are possible. § 6231.31 (Release 6-2, Sept. 3, 1963) provides for evaluation of intra-Federal transfer evaluation. The state director is

to report important Bureau of Land Management antiquity sites to the Director of the Bureau of Land Management and the Regional Director of the National Park Service. The National Park Service will make a determination of the importance of a transfer to another agency for incorporation within an extant public system -- e.g. the National parks -- or for protective purposes. § 6231.33 (Release 6-2, Sept. 3, 1963) provides for transfers to state, local or appropriate private entities; it also provides for retention of, or closely conditioned transfers of, antiquities on Bureau of Land Management lands which are being conveyed. § 6231.34 (Release 6-4, Aug. 4, 1964) establishes similar protective procedures as regards rights-of-way over Bureau of Land Management lands containing antiquities. Provision for reputable investigation, research and study of antiquities on retained Bureau of Land Management lands is made in § 6231.42(C) (Release 6-4, Aug. 4, 1964).

Other assorted regulations should be noted in passing as examples of Federal policy. The Bureau of Sport Fisheries and Wildlife specifies that the statutory trilogy of examination excavation and gathering can be undertaken only with a permit from the Secretary of the Interior, and provides for prior review by the Regional Director.^{44/} The Atomic Energy Commission allows representatives and permittees of the National Park Service to conduct such archaeological surveys as are safe and consistent with Atomic Energy Commission policies, programs and security.^{45/} The Department of the Army essentially restates the Antiquities Act provision, and goes on to assign responsibility for the determination of whether a permit is to be issued to the "Army commander, head of the using service, or the Deputy Chief of Staff for Logistics." The Corps of Engineers is responsible for actual making the land available to the permit-holding user.^{46/}

4. Area-Natural Resource Research Uses

Research into, and study of, the natural resources extant on Federal lands are at the very heart of "education, science and research uses." The uses we consider in this subsection are uses for which, at least in part, a considerable portion of the public lands were acquired or retained. At times this purpose has been made quite express, as for example, one of the criteria for inclusion of lands with the National Wilderness Preservation system is stated to be that the lands "contain ecological, geological or other features of scientific, educational, scenic or historical value."^{47/} Where not so specified, there is implicit throughout the public land law provisions a strong current of concern for research of a variety of kinds.

The most typical pattern of specific legislative provisions for research is quite simple. Congress begins by expressing a concern for a certain natural resources preservation or proliferation, and then authorizes or directs a cabinet secretary or his delegate to take steps to facilitate that end, with research usually being among such steps. In turn, the appropriate official is authorized to enter into "cooperative agreements"^{48/} in order to facilitate the research. In order to economically set out the statutes which follow this pattern, we resort to a tabular presentation (see page 14).

This diverse statutory map is reinforced by a somewhat more coherent scheme of regulations and directives.

The Forest Service provisions in this regard have in part been exposed in the situs uses portion of this section. F.S. Manual § 2726.1.

(Amend. No. 15, Jan. 1969) provides generally for research and study use permits; § 2726.12 refers to experiments and demonstrations. In addition, F.S. Manual § 2746.2 (Amend. No. 65, Nov. 1959) provides for special use permits to schools desiring to use the lands for "experimental and study purposes." When the terms of 36 C.F.R. § 251.2 (1969)^{49/} are satisfied, these use permits may be free, and must be on an annual basis.^{50/} Otherwise, some charge is required, unless gratis dispensation is specifically authorized by the Secretary of Agriculture.

Forest Service accommodation of research and study assumes other forms as well. 36 C.F.R. § 251.23 (1969) directs the Chief of Forest Service to establish and preserve experimental areas and "research natural areas" within the National forests, the latter being directed specifically toward "research or educational purposes." The directors of experimental stations, institutes of tropical forestry, and the Forest Products Laboratory are by F.S. Manual § 2710.46 authorized to grant special use permits.

The Bureau of Land Management is also by specific regulation empowered to set aside "natural resource experiment and research areas." Pursuant to the Classification and Multiple Use Act of 1964, designation of public land must proceed only if authorized by statute or regulation. Such research areas are singled out as subject to designation with the only proviso being that they be relatively small areas of land.^{51/} The effect of 43 C.F.R. 1727.1(6) is to make available a potential designation or classification to be used as the basis for natural area protection and use, whether or not a permit is granted.

Code §	Object of Research	Authorized Official	With whom he may cooperate and any special provision
43 U.S.C. §§ 1361-1363 (1964) (Public Land Administration Act of 1960)	Public lands (defined as those under Bureau of Land Management	Secretary of the Interior	"with others"
16 U.S.C. § 582a-1 (1964)	Forestry, encouragement of state research	Secretary of Agriculture	States, their colleges, certain experimental stations, and other state institutions
16 U.S.C. § 581 (1964)	Forestry in general	Secretary of Agriculture	Individuals, public and private agencies, organizations, and institutions in other countries
16 U.S.C. § 460 k-2 (1964)	Furthering of recreation uses within fish and wildlife conservation areas	Secretary of the Interior	Public and private agencies, organizations, and industries
16 U.S.C. § 460(1)(1), (f)(1) (1964) (Outdoor Recreation Act)	Outdoor recreation	Secretary of the Interior	May sponsor, engage in, and assist in research, no limitations as to whose research can do this by contract or agreement, and may also cooperate with "educational institutions and others" to establish education programs
16 U.S.C. § 661 (1964) (Fish and Wildlife Coordination Act)	All species of wildlife	Secretary of the Interior	Federal, state and public or private agencies and organizations
16 U.S.C. §§ 778, 778a (1964)	Fish speciation parasitical control and harvesting; specifically here, to make public the results of federally initiated research through experimental stations authorized in 16 U.S.C. § 778	Secretary of the Interior	States and other institutions
16 U.S.C. § 668a (1964)	Bald eagle preservation	Secretary of the Interior	Public museums, societies or zoological parks; specifically authorize permits for taking, possessing and transportation of specimens
16 U.S.C. § 753a (1964)	Fish and Wildlife	Secretary of the Interior	Colleges and universities, game and fish departments of the several states, and nonprofit organizations
16 U.S.C. §§ 670a, c (1964), <u>as amended</u> , (Supp. IV, 1969)	Migratory Game (vis-a-vis military reservations)	Secretary of Defense	Secretary of the Interior and appropriate state agencies

Additional provision for research and study is made within the F.S. Manual materials relating to organization campsites within the National forests. The Forest Service has established a six-rung priority ladder for selecting among competing applications for such sites. On the second highest rung, appears those camps contemplating a "specific curriculum and program on conservation education for students or teachers."^{52/} These priorities also form the basis of a sliding fee schedule, which ranges from \$25.00 to 4 percent of land value or \$75.00 (whichever is higher). Conservation education camps are charged 1 1/2 percent of land value or \$25.00 (whichever is higher).^{53/}

C. General Provisions

The specific provision portion of this section has taken account of direct statutory or regulatory references to education, science or research uses, and thus preempted the traditional aspect of this general provision portion. There remain, however, some observations about provisions which make no direct reference to these uses, but which delineate categories into which these uses may fall.

In our chapter three presentation of statutes of general applicability,^{54/} there are numerous provisions which are restricted to grants of land interests to public, quasi-public, or private nonprofit entities for "public purposes." It is important to note, as a general matter, that the bulk of education, science and research uses fall quite comfortably within this restriction, both as to entity and to enterprise.

In addition, there are within and without the chapter three discussion numerous more narrowly drawn restrictions which would easily accommodate education, science and research uses although they are silent as regards them. To take but one example, consider 16 U.S.C. § 667(b) (1964), which permits gratis transfer of surplus Federal property to appropriate state agencies for research purposes.^{55/} It surely is the case that educational, scientific, and research oriented activities which center upon wildlife conservation, and are undertaken by or under the authority of an appropriate state agency, qualify for access to such lands. This will hold true for a wide range of specific statutory provisions, and ought not be overlooked in appraising the uses which are the focus of this section.

II. EVALUATION

Review of the three categories of education and research oriented uses produces a somewhat mixed evaluation of the public land law provisions in this area.

Situs uses -- those uses for which public lands are desirable as a site, but not as an object of the research or study -- seem reasonably well provided for. While, as elsewhere, there is certainly an unnecessary proliferation of legislative provisions, and a resultant crazy-quilt of standards and limitations, the overall pattern seems to afford sufficient administrative flexibility and to avoid any prominent barriers to the sound administration of the public lands in this regard. The discussion of the Forest Service's responses to school location on lands under their jurisdiction affords a good illustration of the administrative utilization of the diverse statutory offerings.

The prognosis for historic uses is similarly one of basic soundness. Here the statutory pattern is considerably tighter, and the administrative procedures which have been established support the protective and exploitative functions to which the legislation commits the Federal Government.

The resource uses picture is much less satisfactory. In this category, we have included those uses in which contemporary resources of the public lands become the direct object of research and education. It is this area which is of greatest importance as regards the utility of the Federal public lands for education, science and research, and it is certainly this area which poses the greatest demands on the administration and resource allocation of the public lands. Neither the applicable legislation nor its regulatory complement are adequate for these purposes.

Basically, the problem is two-fold, and classic in both of its dimensions. Missing from statute and regulation here is (1) Any serious attempt to delineate priorities, and (2) Any provision for the inter-agency coordination of decisions and dispensations of land resources. Basic to both of these problems is the root fact that many research uses are completely incompatible with other uses, such as recreation, and quite often, are incompatible with each other. This is especially true of research centering on so-called "natural resources". The augmentation of such research will very often require the isolation and preservation of special areas, in order to avoid the disruption of ecological cycles, the destruction of samples, the driving away of rare species, and so on.

Rational decision-making in such circumstances requires intelligent adjudgment of priorities and coordination among the several agencies responsible for the Federal public lands. Absent provisions for such decision making, the present scheme is seriously flawed.56/

Footnotes

1. In addition, the policy of the authorizing legislation of the National parks specifically states that the printing of informative signs is "required" in the administration of natural areas. 16 U.S.C. § 14a (1964). Further, the National Park Service dedicates much effort to the creation of interpretive trails, living exhibits, museum and other educational programs that stress the educational potential of "conservation" projects. The National Park Service's visitor policy bespeaks the educational values of natural areas. National Park Service, Dep't of the Interior, Administrative Policies for Natural Areas of the National Park System 48-52 (1968).
2. Forest Reserve Act of 1897, 16 U.S.C. §§ 424, 473-482 (1964).
3. Forest Service Manual § 2723.17 (Amend. No. 15, Jan. 1969) (hereinafter cited as F.S. Manual).
4. Id.
5. Pursuant to 43 U.S.C. § 931c (1964), infra, the Forest Service has established 5 percent per annum as the standard for fair market value. Therefore, the "nominal" 3 percent is the greater part of the standard charge.
6. F.S. Manual § 2723.17 (Amend. No. 15, Jan. 1969).
7. Id.
8. First of the statutes classified "Rights of Way and other easements in the Public Lands."
9. F.S. Manual § 2723.17 (Amend. No. 15, Jan. 1969).
10. Id.
11. Id.
12. 16 U.S.C. § 484a (Supp. IV, 1969).
13. F.S. Manual § 2723.1 (Amend. No. 15, Jan. 1969).
14. 40 U.S.C. §§ 471-484 (1964). This broad statute will be treated in discussion, supra, of disposal and management of public lands general

15. Id. § 484(k)(1)(A).
16. 41 C.F.R. § 101-47.308-4 (1969).
17. Bureau of Reclamation Instructions § 345.5.6 (Oct. 16, 1961).
18. Specific policy and procedural measures are itemized in SECNAVINST §§ 11011.27 4a-b, e, 6 (Aug. 1961); SECNAVINST § 11013.6b CHANGE TRANSMITTAL §§ 3, 6, 10, 11, 12 (Dec. 1963).
19. See discussion of general licensing authorization, *infra*. SECNAVINST § 11011.12a (Aug. 1958).
20. Compare id. § 11011.27 4b (Aug. 1961) with id. § 11013.6f (Dec. 1963).
21. See general discussion of this Act in Chapter III. "Excess" and "surplus" are defined in 40 U.S.C. §§ 472(e), (g) (1964).
22. 10 U.S.C. § 2667(b)(1)(1964).
23. F.S. Manual § 2726.13 (Amend. No. 15, Jan. 1969).
24. Id. § 2726.12.
25. Id.
26. Id.
27. Id. § 2726.12a.
28. 16 U.S.C. §§ 431 - 433 (1964).
29. Id. §§ 461-467.
30. Id. §§ 470-470m (Supp. IV, 1969).
31. Id. § 432 (1964).
32. Id. § 462(h).
33. Id. § 470f(Supp. IV, 1969).
34. Id. § 470a(b)(1).

35. Id. § 470a(b)(2).
36. Id. § 8e (1964).
37. 50 U.S.C. §§ 1622(h)(1)-(3) (1964).
38. 40 U.S.C. § 484(k)(2)(C) (1964).
39. 16 U.S.C. § 432(k)(2)(C) (1964).
40. Forest Service Handbook § 2713.3q (1958) (hereinafter cited as F.S. Handbook)
41. No permit shall be granted if the structure can be permanently preserved under the control of the United States in situs. In general no permit will be granted for more than three years. Failure to being work within six months or failure to diligently prosecute such work are grounds for voiding such permit. Permits will be granted for only that area that the applicant can reasonably be expected to fully explore within the time limit named in the permit. The permits are terminable at the discretion of the Secretary having jurisdiction.

Each application to the local representative of the Secretary must be accompanied by a definite outline of the proposed work, its character, and a sketch plan or description of the site. The field officer in charge may examine the permit of any person claiming the privilege and may examine all work done under such permit. Any person who injures or appropriates historic or prehistoric objects under the jurisdiction of the Secretaries is subject to arrest. Objects illegally taken may be seized at any time. After completion of the work, the permittee must restore the land to its customary condition, to the satisfaction of the field officer in charge.

Collections made under such permits "shall be preserved in the public museum designated in the permit and shall be accessible to the public."

42. F.S. Handbook § 2713.3e (1958).
43. 43 U.S.C. §§ 869 to 869-4 (1964), as amended, (Supp. IV, 1969).
44. Bureau of Sport Fisheries and Wildlife Field Manual § 3439 (Nov. 1957).

45. Atomic Energy Commission Manual App. ch. 5301 pt. 6 E(1)(b) (Apr. 16, 1968).
46. Dep't of the Army Pamphlet No. 27-164 § 12.9 (Oct. 1965).
47. 16 U.S.C. § 1131(c)(4)(1964).
48. Memoranda of understanding, analogous to the agreements which are contemplated by these statutes, are on occasion drawn up between Federal agencies, in order to expedite Government research or education uses. See, e.g., F.S. Manual § 1542.2 (Amend. No. 94, Aug. 1964) (Memorandum of understanding between the Soil Conservation Service and the Forest Service for soil surveys on National forest lands).
49. 36 C.F.R. § 251.2 (1969) provides for the issuance of a free permit if the use is by a governmental, public or semi-public agency in connection with an authorized use of National forest resources, of benefit to the Government or compatible with the public interest when such use is authorized by Congress. The general fee provisions, § 251.3, provides for a fee commensurate with the value of the use authorized by the permit, as established by the Chief "except that any such permit to any state or political subdivision thereof or any public agency or for nonprofit purposes may be issued without charge as may be deemed appropriate." The § 251.3 requirements seem less stringent for those who may qualify for a free permit. But it appears to be a policy of the Forest Service to strictly delimit the use of the free permit. F.S. Manual § 2726 (Amend. No. 15, 1969) states that permits should be issued to "private individuals or groups. . . on a charge basis." This would seem to contradict the language of § 251.3 that "nonprofit purposes" are sufficient grounds for issuance of a free permit if the "nonprofit purpose" is the goal of the individual or group. § 2726 also tends to close the apparent breadth of § 251.2 authorization of free permits for "semi-public" uses.

F.S. Manual § 2710.12a (Amend. No. 12, Oct. 1968) provides that "the permit may be issued without charge, except that such issuance without charge is not authorized when . . . the funds derived through the permit are used to support other activities of the permittee. This includes permits to state, county, municipal and other political subdivisions when income derived from the use is not set aside in a trust account to be used to pay specified expenses for the area. . . (not authorized if) the use does not benefit the general public." A use is not considered to benefit the general public if there are

restrictions on those who might receive any benefits from it, if special groups or organizations have any priority of use, if there is any inequality in opportunities to make reservations or any other action of the permittee tending to deny access. Id.

According to F.S. Manual § 2710.12b (Amend. No. 12, Oct. 1968) permits "which are free will be revised to charge permits at the earliest opportunity" when such free use is no longer justified. The responsibility for justifying free use rests with the authorizing officer. F.S. Manual § 2710.3 (Amend. No. 12, Oct. 1968) provides that free or nominal charges should be required only when "clearly" in the public interest. If a free use permit is granted, a justification statement must be prepared and filed in the case folder. The free permit is highly circumscribed and the policies noted seem to amplify the "or for such charge as may be deemed appropriate" language of § 251.3.

F.S. Manual § 2715 (Amend. No. 12, Oct. 1968) outlines several fee schemes which might be appropriate in the semi-public sphere. Minimum fee charges are available. However, if a free permit is found unnecessary, the Forest Service recommends a nominal fee ("somewhat less than commercial value") rather than the minimum ("the lowest fee that may be charged for a particular type of use"). F.S. Manual § 2715.41(c) (Amend. No. 12, Oct. 1968) states that, "Semipublic and public agencies often cannot qualify for free use under 36 C.F.R. § 251.2 (1969) because of their restrictions in the use of the public lands under permit by the general public. In these cases, a nominal fee is often appropriate."

50. F.S. Manual § 2721.13b (Amend. No. 15, Oct. 1968).

51. 43 C.F.R. § 1727.1(b)(4) (1969).

52. F.S. Manual § 2721.13b (Amend. No. 15, Jan. 1969).

53. Id. § 2721.13c.

54. See supra.

55. Oil, gas and mineral rights must be reserved, and the grant must be defeasible upon termination of the wildlife conservation use or upon need for National defense purposes.

56. Discussion of this problem in the context of natural areas appears in the resource section of this report.

CHAPTER VI PUBLIC LANDS AND UTILITIES

Chapter VI is devoted to public lands and to the public use of them. It deals with the various interests in public lands, the various uses to which they are put, and the various agencies which are concerned with them. It also deals with the various laws and regulations which govern the use of public lands.

This chapter will discuss the various interests in public lands, the various uses to which they are put, and the various agencies which are concerned with them. It also deals with the various laws and regulations which govern the use of public lands.

CHAPTER VII

DISPOSAL, USE AND OCCUPANCY OF PUBLIC LANDS FOR UTILITY PURPOSES

CHAPTER VIII PUBLIC LANDS AND UTILITIES

Before discussing the various interests in public lands, it is necessary to discuss the various uses to which they are put, and the various agencies which are concerned with them.

Sparsely settled lands, which are not suitable for agriculture, have been reserved, and are now being used for various purposes, such as for the establishment of national parks, and for the establishment of national monuments.

CHAPTER VII

DISPOSAL, USE AND OCCUPANCY OF PUBLIC LANDS FOR UTILITY PURPOSES

Structures required to provide basic services to the public, i. e., water, light, heat, and information, presently occupy many acres of land in the United States. The demands for such services increases continuously with population growth and urbanization. Enactment of general statutory authority to locate basic utility structures on public lands began roughly a century ago. These acts encouraged the expansion of basic services needed for public convenience and economic development by reducing the costs represented by real property expenditures in providing them.

This chapter will examine the existing federal legal system governing the disposal, use or occupancy of public lands for purposes of 1) water storage and transmission; 2) electric power generation, transmission, and distribution; 3) communications facilities; and 4) oil and gas transmission. This order of presentation generally reflects the chronological order in which the legislation providing for such uses was enacted in order to assist the reader to sense the progression that is otherwise difficult to ascertain in the largely incremental acts that govern the use of public lands for utility purposes.

I. DISPOSAL, USE, AND OCCUPANCY OF PUBLIC LANDS FOR WATER STORAGE AND TRANSMISSION PURPOSES

A. Overview and Historical Development

Before examining the statutes comprising the existing Federal legal system governing water storage and transmission on public lands, the reader should have some conception of the present scale of such development in the eleven western states which contain most of the Nation's public and arid lands.

Approximately twenty-three million acres of land in these states has been irrigated, almost a third of it in California alone, and between 800, 000 and 2, 800, 000 acres in each of the other ten states. 1 / In this same area are 690 surface reservoirs, each of at least five thousand acre-feet capacity. Slightly under seventy per cent of the aggregate capacity represented by these structures is

Federally owned consisting of forty-eight per cent held by the Bureau of Reclamation and twenty per cent held by the Army Corps of Engineers; the ownership of the remaining reservoirs is divided in a ratio of roughly two to one between state and locally owned structures. 2 / It can be appreciated from these last statistics that only a very small per cent of the water storage capacity in the western states is accounted for by the many acts still in existence which are discussed as a cluster following these introductory comments.

It is also desirable to understand what types of structures are commonly included within the general category of water storage and transmission facilities. While none of the statutes to be discussed systematically enumerates or defines all of the variety of water storage or transmission structures to which it applies, most have been construed broadly to cover the spectrum of structures regardless of the terminology actually employed by them. Of the agencies administering lands on which such structures are located only the Forest Service has methodically differentiated these structures. 3 / For the benefit of readers unfamiliar with such structures, these definitions are repeated here. "Transmission" is used to cover all the various methods or combination of them for water transmission and distribution. "Conduits" refer to any artificial channel for conveying water; it may include a pipe or tunnel, although the term "tunnel" is usually employed where water is transmitted through high ground or mountains. "Pipelines" cover all pipelines not exceeding two inches; those exceeding two inches are considered conduits. "Canals and ditches" is used to cover artificial channels excavated into earth materials, though they are sometimes lined. "Flumes" include artificial channels of wood, metal, concrete, or masonry, usually supported above the surface of the ground, commonly used for transmission of water across a topological depression or difficult terrain. "Reservoirs" are structures for impounding appreciable volumes of water. "Diversions and weirs" are structures for diversion of water or water measurement structures which do not involve the impoundments of appreciable volumes of water. "Wells, springs, and wind-mills" are usually components of domestic private water systems. "Water systems and supplies" include those systems and supplies for community improvements, wildlife, and other purposes which are not defined by the foregoing terms.

The existing Federal legal system governing the use of public lands for purposes of water storage and transmission may be divided for purposes of this discussion into two basic clusters of statutes. One of these clusters concern recognition, direct grant, or administrative grant of rights of way used by nonfederal entities over public lands

incident to the exercise of water rights vested in them under state law. Congress enacted this group of statutes roughly between the end of the Civil War and the beginning of this century, although several general rights of way provisions enacted fifty years later to enable the use of particular reserved public lands also provide for water storage or transmission over these lands. Excluding detailed discussion of these latter acts here, however, because they have been described in the introductory chapter concerning the Federal legal system, statutes included in the first cluster of statutes are grouped as follows:

- (1) The Act of July 26, 1866, R.S. 2339, 14 Stat. 251, as amended by the Act of July 9, 1870, R.S. 2340, 16 Stat. 218, 30 U.S.C. § 51, 52, 43 U.S.C. § 661 (1964)
- (2) the Act of March 3, 1891, 26 Stat. 1102, as amended, 43 U.S.C. § 946-948 (1964) supplemented by the Act of February 26, 1897, 29 Stat. 599, 43 U.S.C. § 664 (1964) and the Act of May 11, 1898, 39 Stat. 1197, as amended, 43 U.S.C. § 951 (1964)
- (3) the Act of January 21, 1895, 28 Stat. 635, as amended, 43 U.S.C. § 956 (1964);
- (4) the Act of February 15, 1901, 31 Stat. 790, 43 U.S.C. § 959 (1964); 16 U.S.C. § 79, 522 (1964); and
- (5) the Act of February 1, 1905, 33 Stat. 628, 16 U.S.C. § 524 (1964); 4/

Two other acts pertaining to rights of way for water storage or water transportation by nonfederal entities on public lands concern reservoirs for livestock and water storage or transmission on Indian lands. Both are of limited interest this study.

The Act of January 13, 1897, 5/ concerns only rights of way for the construction of reservoirs to water livestock by "any person, livestock company, or transportation corporation engaged in breeding, grazing, driving, or transporting livestock." The act authorizes rights of way for this use only over unreserved non-mineral public lands. Department of the Interior regulations preclude them over lands in grazing districts or wildlife refuges. 6 / The regulations also deny a right of way for a livestock reservoir of less than 250,000 gallon

capacity unless artificial means (windmill, pumps, etc.) will be used to supply water to all animals likely to use the reservoir. 7 /

Only a license to use the land is involved and no estate in the land is granted though the license may endure permanently. 8 / The Act and regulations provide that the grant may last as long as the reservoir is maintained and water kept in it. 9 / The regulations provide, however, that the grant will be cancelled if the reservoir is not constructed within two years after application is made for it. 10 /

The maximum size of the right of way is limited by statute to 160 acres. Department of the Interior regulations provide that no more than 40 acres will be allowed for a reservoir of less than 500,000 gallons capacity, nor more than 80 acres for one with between 500,000 and one million gallon capacity, nor more than 120 acres for one with capacity between one and one and one-half million gallons, nor more than 160 acres for one with capacity over one and one-half million gallons. 11 /

Fencing livestock reservoirs is prohibited by statute unless provisions are made to maintain them open to free use by anyone.

The Act of February 5, 1948, 12 / was passed authorizing rights of way "for all purposes" over all categories of Indian Lands, including those held in trust or restricted against alienation. The Act was necessary because other statutes concerning water storage or transmission authorized no rights of way for lands allotted to Indians outside of Indian reservations or, like the 1890 and 1891 Acts, were construed not to apply to lands within Indian reservations. The Department of the Interior construes this Act to authorize rights of way for all uses enumerated in any other specific statutes. 13 / Although the effect of doing so seems contrary to Congress's intention, the Senate report accompanying this Act explains that it preserves pre-existing statutes concerning rights of way over Indian lands "to avoid any possible confusion which may arise, particularly in the period of transition from the old system to the new." 14 /

The Act is silent concerning eligible grantees, but the Department of the Interior has held that the United States is among them. 15 /

The 1948 Act grants a "right of way" over Indian lands without further defining the interest created. Applicable Federal regulations provide that rights of way granted are "in the nature of easements or permits for the periods stated therein" but are terminable upon abandonment or discontinuance of the use for which granted. 16 / They also provide

that rights of way for water control projects, including but not limited to dams, reservoirs, flowage easements, ditches and canals shall be without limitation as to the term of years. The Act therefore appears to create an easement, not a license.

Because each statutory group consists of a basic statute and its amendments and supplements the five main groups of statutes are segregated and discussed seriatim as to scope of use authorized by them, lands to which they apply, and class of grantee entitled to benefits under them. For purposes of describing agencies administering them, kinds of interest granted by them, and charges, if any, and other conditions attached to them, they are considered as a single cluster.

The second cluster of statutes consists of two acts which reserve to the United States rights of way over public lands to be used in connection with activities of the Federal Government authorized under the reclamation laws. These are:

- (1) The Act of August 30, 1890, 26 Stat. 391, 43 U.S.C. § 945 (1964); and
- (2) the Act of December 5, 1924, 43 Stat. 704, as amended, 43 U.S.C. § 417, (1964).

They are included in this discussion merely for completeness of chronological presentation. The Federal reclamation and power marketing program is discussed subsequently in this chapter in connection with the use of public lands for electric power purposes.

The use of water on public lands and the construction of means to transport water over public lands to benefit private lands preceded any Federal statutory authorization for such purposes. Private groups and individuals identified the most promising sources of water on or near public lands and established their rights to it under state law. 17 / Reservoirs, canals and ditches were built, irrigation or water districts formed under state law, and private water companies contracted to sell or lease water.

No Federal legislation encouraged or impeded this activity until after the Civil War. Then the Act of July 26, 1866, R.S. 2339, 43 U.S.C. § 661, 30 U.S.C. § 51, supplemented by that of July 9, 1870, R.S. 2340, as amended, 43 U.S.C. § 661, 30 U.S.C. § 52, was passed to protect preexisting water rights and rights of way for "reservoirs" and for "ditches and canals" constructed over lands within the "public domain" incident to the use of such water rights

recognized as vested through priority of possession under local law for "mining, agricultural, manufacturing, or other purposes." 18 / State law thus determines what entities are entitled to the benefits of this Act. The Act has been construed as a "continuing offer" of rights-of-way for such purposes as well. 19 /

Courts have construed this Act to recognize rights-of-way from flumes, tunnels, or pipelines to conduct water, or dams for water storage as well. 20 / For thirty years rights-of-way used for generation of electrical power were also recognized under this Act as a use for "manufacturing" purposes. 21 /

The Act does not specify the lands to which it is applicable. However it refers to the "public domain" in providing that persons constructing ditches or canals shall be liable to settlers for any damage incident to such construction, as well in several other places. 22 /

The Department of the Interior, however, has held that the Act does not confirm rights-of-way over Federal reservations. 23 / Federal courts concur that this statute is not applicable to lands reserved from the public domain. 24 / State courts appear divided regarding this issue. 25 /

One of the principal objectives of Congressional provision of rights-of-way for water storage or transportation for the next half century remained the reclamation of arid lands for agricultural production through irrigation or drainage. In 1877 the Desert Land Act encouraged settlement of arid public lands in several western states, but did not preclude others from continuing to develop water rights and to use rights-of-way over those public lands incident to them under the 1866 and 1870 Acts. 26 / These early Acts were predicated on the hope that private investment and labor would be sufficient to develop the water resources needed for settlement and economic expansion in the western states. Such hopes, though not well founded, boosted speculation in public lands. 27 / In order to curb further inflation of land values before determination of suitability for irrigation, Congress passed the Act of October 2, 1888 28 / providing that all lands designated by the Geological Survey as "necessary for the storage and utilization of water," including canals and ditches, for irrigation purposes and all land susceptible of irrigation by anticipated development be reserved from sale or other entry. The Act also offered means by which the Federal Government might avoid the possibility of having to purchase rights-of-way over such lands for any subsequent reclamation efforts for which might later be authorized.

By 1889 some 150 reservoir sites had been chosen and 30 million acres of arid lands capable of irrigation had been selected for withdrawal. 29 / By this time, however, the pressures for development of these lands were too strong to permit the delay necessary for land classification. In 1890 except for the reservoir sites these lands were restored to the public domain for disposition, but the Act restoring them 30 / in order to further Federal reclamation policy 31 / directed that a reservation to the United States be made in all patents issued after August 30, 1890 under any land law of the United States for lands west of the one hundredth meridian of a right-of-way for "ditches or canals constructed by authority of the United States." The Supreme Court has construed this act to reserve to the United States not only rights-of-way for then existing canals and ditches but also for those which the United States might construct at any time in the future. 32 /

Early Department of the Interior decisions held that rights-of-way might be reserved under this Act for irrigation only. However, after Congressional action in 1898 and 1901 33 / authorizing broader use of rights-of-way than irrigation, the Department recognized that rights-of-way reserved to the United States under the 1890 Act could be used to provide water for domestic uses as well. 34 /

The Department originally construed this act to permit reservation of rights-of-way over all lands which were part of the public domain in 1890 though they might subsequently become Indian reservations. In 1947, however, it adopted a narrower interpretation of the legislative history of this Act thereafter excluding from reservation under this Act rights-of-way over any public lands not open to occupation, entry, or disposition. 35 /

In 1891 Congress provided other means to regulate the acquisition of water rights and rights of way incident to them over public lands which were recognized in the earlier Acts of 1866, 1870, and where applicable, the Desert Land Act of 1877. The Act of March 3, 1891 36 / continued to encourage irrigation by nonfederal entities, specifically "any canal ditch company, irrigation or drainage district formed for the purpose of irrigation or drainage, and "individuals, associations, and corporations." By later supplement, "states" were included. 37 / It grants rights-of-way for the construction, operation, and maintenance of reservoirs, canals, and laterals "for the purpose of irrigation or drainage." The Act provides that the rights-of-way granted pursuant to it shall be occupied only for the purpose for which they were approved. 38 / The Department of the Interior construed the purposes for which the Act conferred such rights of way to be limited to irrigation, 39 / until it was supplemented by the Act of

May 11, 1898. 40 / which broadened the use of rights-of-way available under it to include "purposes of a public nature" and "purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation or drainage".

As with the Act of 1890, supra neither the courts nor the Department of the Interior have restricted the means used to transport water to those described by language employed by the Act of 1891. 41 / Department of Interior regulations state that this Act applies to rights-of-way for "pipelines, flumes, or other conduits" despite the fact that they are not mentioned in it. 42 / However, a natural body of water cannot be appropriated by obtaining a rights-of-way over it as a reservoir site. 43 /

The Department of Interior has, however, recently imposed a new restriction upon the grant of rights-of-way under this Act when they are intended for purposes of agricultural reclamation. It denies such grants where the result would be contrary to the public interest by increasing the pressure on an inadequate water supply available for use in an area from a particular source of water at the time. 44 /

This Act has been interpreted as merely supplementing the 1866 and 1870 provisions for acquisition of such rights-of-way incident to water rights obtained pursuant to state law by providing mandatory recording procedures to protect them. 45 /

Inasmuch as it applies to rights-of-way over "public lands and reservations of the United States," however, it would also clarify or broaden them. The Act of February 26, 1897 extended the provisions of the 1891 legislation to lands earlier withdrawn by the United States as reservoir sites. 46 / If such lands are "reservations" which are already referred to in the 1891 Act, this provision would appear to be superfluous. It does, however, illustrate the uncertainty characterizing the use of such terms as "public domain," "public lands," and "reservations" in early statutes since their enactment.

The 1891 Act was supplemented for the last time by the Act of March 1, 1921, 41 Stat. 1194, 43 U.S.C. § 950, which authorizes a right-of-way for buildings or corrals for the convenience of those engaged in constructing or maintaining structures built on rights-of-way pursuant to it. 47 /

Despite increasing evidence that private resources and endeavors were not adequate for efficient or large scale water development in the western states, Congress was reluctant to authorize direct Federal participation in such efforts until 1902. In the interim, however, the Carey Act of August 18, 1894 48/ provided means whereby some western states experimented with irrigation of public lands granted to them for that purpose and states generally were declared eligible to obtain rights-of-way for purposes provided for in the 1891 Act. 49/

Several additional Acts supplemented existing authority for private entities to obtain rights-of-way over public lands for increasingly broad purposes.

Perhaps because the 1891 Act was then still construed as limited to irrigation purposes, Congress thought it necessary to pass the Act of January 21, 1895 50/ to provide rights-of-way for canals or reservoirs (and tramroads) over public lands outside National forests, parks, military or Indian reservations, to citizens and associations of citizens "engaged in the business of mining or quarrying or of cutting timber and manufacturing lumber or for the purpose of furnishing water for domestic, public, and other beneficial uses. "51/

In 1901 the first general Federal provision of rights-of-way over public lands and reservations for use by private entities for various utility purposes was enacted.

The Act of February 15, 1901 authorizes rights-of-ways to citizens, associations, and corporations for electrical power plants and telephone, and telegraph, and electric transmission lines. It also provides rights-of-way for "canals, ditches, pipes and pipelines, flumes, tunnels, or other water conduits" and for "water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial use." Rights of way are not restricted to personal use by such grantees; they may be utilized to supply a municipality with water. 52/

The Solicitor of the Department of Interior ruled that this Act superseded the act of 1895 supra as to rights-of-way for canals and reservoirs. 53/ It would seem that it should have superseded the Acts of 1891 and its predecessors as well.

This act applies to "public lands, forests and other reservations of the United States" as well as to several National parks. Authority to grant such rights-of-way over these lands is given to the Secretary of Interior. Authority to grant them over National forests is given to the Secretary of Agriculture. However, the Act of June 4, 1897, which generally authorizes the Secretary of Agriculture to regulate the use and occupancy of National forests, rather than the Act of February 15, 1901, is used by the Forest Service for the issuance of permits for water storage and transmission.

The Act of February 1, 1905, 33 Stat. 628, 16 U.S.C. 524 transferred to the Secretary of Agriculture authority previously residing in the Secretary of Interior to grant to citizens and corporations rights-of-way across National forests "for construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals" for municipal or mining purposes.

B. . Particulars of the Statutes

1. Administrative Agency

Only two of the foregoing statutes, the Acts of 1895 and 1901, require prior administrative approval of a right-of-way for water storage or transmission structures. The 1895 Act confers upon the Secretary of Interior discretion to authorize canals and reservoirs on public lands outside of Federal reservations. The 1901 Act authorizes the Secretary of Interior to permit rights-of-way for all manner of water facilities on public lands and Federal reservations, including forest reservations until such authority was taken from it in 1905. It confers the same authority on the Secretary of Agriculture for lands within National forests.

Authorization forms used by these respective Departments are described by different terms. The Department of Interior issues "rights-of-way" under both the 1895 and 1901 Act for these purposes. The Forest Service issues "permits" for purposes authorized by the 1901 Act. Annual permits for "water transmission," regardless of the method of transmission employed, and "dam or reservoir permits" for structures to impound or store water are described in the Forest Service Manual. 54/ Some dams and reservoirs are also authorized pursuant to "special use permits" issued by the Forest Service. 55/

2. Acreage

The maximum amount of land over which a right-of-way for water storage or transportation is obtained under these statutes differs from Act to Act.

The Act of 1891 and the Act of 1901, each limit the size of a reservoir site right-of-way to the ground occupied by the reservoir plus fifty feet on each side of its marginal limits. Both limit the size of water conduit rights-of-way to the ground occupied by them, plus under the 1891 Act, fifty feet on each side of the marginal limits, and under the 1901 Act, fifty feet on each side of the center line of the conduit. The 1891 Act authorizes the Secretary of Interior to award additional rights-of-way needed by the grantee to properly operate or maintain reservoirs or water conduits.

All other Acts are silent concerning the size of rights-of-way conferred pursuant to them. In these cases, administrative regulations determine any limits on the maximum size of grant available. Department of Interior regulations authorize the grant of additional right-of-way needed for ingress and egress to the primary right-of-way and the construction and maintenance of facilities necessary for ingress and egress. 56/

3. Interest and Tenure

The nature of the interest in land available under the five groups statutes previously described has been the subject of dispute. All authorize the grantee to use land which he does not own for certain purposes. All describe such rights merely as "rights-of-way" 57/ or the "use of a right-of-way;" 58/ none, except the 1901 Act provides any further clarification. A "right-of-way" at common law conferred no interest in the land, it merely authorized a right of passage. 59/ Current Department of Interior regulations, applicable to these Acts, define "right-of-way" as including "license," "permit," or "easement," and state that no interest granted under them confers "any estate of any kind in fee." 60/ They provide that the interest granted under such documents "shall consist of an easement, license, or permit in accordance with the terms of the applicable statute" but that "no interest shall be greater than a permit revocable at the discretion of the authorized officer unless the applicable statute provides otherwise." 61/

However, early opinions of the Department of Interior and of state and Federal courts waived in regard to identifying the interest provided under several of these Acts.

State courts held that the "right-of-way" confirmed by the 1866 Act was a license while the lands remained in the public domain, but an easement once the lands entered private ownership. 62/

Early Department of Interior decisions construing the 1891 Act held that no fee interest in the land used was created but instead a mere right of use was conferred. 63/ State courts held accordingly. 64/ The Supreme Court, however, ruled in Rio Grande Western Ry. Co. v. Stringham, 239 U.S. 44, 47 (1915), that language authorizing railroad rights-of-way which was substantially the same granted neither an easement nor a fee simple absolute, but a limited or qualified fee made on an implied condition subsequent that in the event that the land ceased to be used for the authorized purpose it reverts to the United States. The Department altered its decisions accordingly. 65/ Since Great Northern Ry. Co. v. United States, 315 U.S. 262, 271, (1942); United States v. Union Pac Ry. Co. 353 U.S. 112 (1957), the Supreme Court has held the interest to be an easement, and the Department has once again returned to that characterization of the interest. 66/

Rights-of-way over forest lands for water storage and water transportation purposes authorized under the 1891 Act are described as "easements" in the Forest Service Manual.

The interest conveyed by the 1895 legislation granting "the use of a right-of-way" has been termed by both courts and the Department of Interior to be a mere license, revocable at the discretion of the Secretary of the Interior. 67/

The proviso attached to the act of 1901 declares that no interest in land is conferred under it and that rights obtained are revocable at any time in the discretion of the Secretary granting them. 68/

None of the statutes concerning rights-of-way for water prescribe a term of years during which the right-of-way will exist.

The 1891 Act does provide for forfeiture of portions of any right-of-way construction over which is not completed within five years after locating the right-of-way with the Secretary. Both courts and the Department of Interior have held that either legislative declaration or initiation of judicial proceedings by the Attorney General on behalf of the Secretary is required to enforce these provisions unless the grantee has agreed to other means of enforcement. 69/

4. Price

The statutes authorizing rights-of-way for storage or transportation of water are silent concerning the right to charge money for the grants authorized. A Department of Interior decision holds that a fee for such grants may be imposed as a condition where discretion exists to grant or deny the right altogether. 70/

Department of Interior regulations specify that no charge will be made for a right-of-way authorized by the Act of 1891 or where the grantee is a Federal agency or the use is exclusively for irrigation projects, municipally operated projects, nonprofit projects, or Rural Electrification Administration projects. 71/ Otherwise the regulations prescribe a minimum charge of \$25 per right-of-way, permit, or easement per five year period or the fair market value of the grant as determined by appraisal by the authorized officer, who may require in advance a lump sum or periodic payment. 72/ Where the grant is relinquished voluntarily prior to expiration of the term, the Department will refund advance payments in excess of \$25 made for the unexpired portion of the term. 73/

Forest Service policy requires a fee for land occupancy and rights-of-way for water storage or transmission unless a nominal fee or free use is justified. 74/ Such fees compensate the United States for destruction of forest resources incident to these uses. The fee is generally determined by the return that could have been obtained from the acreage of land that was taken out of timber and/or grass production for water storage or transmission use. Fees vary commensurately with geographical land value and productivity; however the minimum fee is a five dollar annual charge or five per cent of the market value of the land (not less than two dollars per acre per year or ten dollars per mile or fraction of a mile) depending on which is greater.

Unless the permittee qualifies for free use, fees for wells, springs, and windmills used as part of a domestic private water system are charged on a per-site basis for all system components. 75/ Similarly unless the permittee is entitled to free use, charges for water system and supplies are a minimum of fifty dollars or ten per cent of the receipts of sale where water is sold from wells drilled on National forest lands.

Noncommercial water storage or transmission structures which are available to the general public may qualify to use National forest lands without charge under the Forest Service free use policy provision. Similarly, if substantial public value accrues from a reservoir or the water development is used in connection with Forest Service resource management, free use of National forest lands is permitted. Examples of situations justifying free use are where the structures: 1) materially contribute to proper management of National forest lands; 2) provide water for grazing livestock; 3) raise the water level so as to provide a fish habitat; 4) substantially improve the area water table; 5) help watershed and flood control protection or 6) provide a water source for firefighting, sprinkling, or other beneficial public use.

5. Conditions

Few of the statutes themselves concerning rights-of-way for water storage or transportation contain express conditions which must be met in order to obtain the grant authorized. However, compliance with various provisions of these statutes might be regarded imposing conditions upon the grant. One such example might be the obligation to record and complete construction under the 1891 Act. Rights of way under the 1891 Act may vest in one of two ways. If the lands on which they are to be constructed have been surveyed, the right-of-way for the facility may vest, subject to reversion for breach of the implied condition subsequent to construct the facility, by filing a map locating the facility to be built with the Federal agency administering the lands.⁷⁷

Otherwise rights-of-way under the 1891 Act vest upon actual construction of the water facility or conduit on public lands and the filing of a map designating location of the structure.⁷⁷

While at least one Department of Interior decision ⁷⁸/suggested that the filing of a map for approval of the Secretary after construction of a reservoir under the 1891 Act merely protected the grantee against claims to that location by other parties, Federal courts ⁷⁹/have ruled that no rights are acquired until such approval is received, and current Department of Interior regulations ⁸⁰/and decisions ⁸¹/hold accordingly.

The prerequisite of such approval provides a means for the Department of Interior to impose conditions on such grants.⁸²

Rights-of-way recognized by the 1866 Act are acquired by mere construction 83/ of the canal or reservoir. All other statutes concerning rights-of-way for storage or transportation of water for various purposes require administrative application and approval to obtain the grant.

Forfeiture provisions under the 1891 Act described earlier might be considered to be in the nature of a condition subsequent. Other specific prohibitions and liabilities might be considered conditions as well. For example the 1891 Act forbids prospective grantees to interfere with the proper Government occupation of a Federal reservation or to interfere with state control of water for irrigation and other purposes. It also imposes liability on grantees for damage to the possession of settlers on such lands.

Most conditions imposed upon the grant of a right-of-way under these statutes derive from administrative regulations promulgated pursuant to directions contained in them that the grant be made pursuant to regulations issued by the granting authority and/or subject to conditions which he may attach.

Where the allowance of a grant is discretionary and not mandatory, the Federal courts have upheld imposition of conditions not prescribed by statute to protect the public interest if they are not otherwise prohibited by law. 84/

Department of Interior regulations applicable to all rights-of-way as set forth earlier provide that the acceptance of a right-of-way constitutes consent to be bound by thirteen conditions unless any are waived by the Secretary. 85/

Of particular relevance to rights of way for water storage and transmission structures are Department of Interior regulations requiring a statement from the proper state official or other evidence of a right to appropriate water. 86/ The Department will not approve an application for a water pipeline right of way if it is determined that the applicant has no right to the water which he proposes to convey, but it will not adjudicate questions involving state water rights under an application for right of way privileges over the public land. 87/

Forest Service intra-agency materials suggest that great care is taken to assure that permits issued by it under the 1901 Act or pursuant to special use permits provide for the protection of forest land resources and other Federal purposes by conditions inserted in the authorizing instrument.

Applications for permits for dams and reservoirs are investigated to determine their potential impact on Forest Service administered land resources. 88/ Project approval is based on the need for the project plus certification of engineering adequacy and safety. 89/ Consideration is given to the location of the proposed project and its effect on water bodies and fish and wildlife. Alternate reservoir sites are considered which might better be used to enhance multiple use management. The ability of natural stream channels to handle overflow without erosion or other damage is reviewed. A report on the effect of the project on fish and wildlife values is requested from both state and Federal fish and wildlife agencies.

Before an applicant is requested to prepare any engineering plans for new reservoir sites within wilderness areas, sites within primitive areas, or applications which contemplate lowering any natural lake, the Regional Forester must be consulted.

A Forest Service checklist of items to be considered in preparing a dam or reservoir permit includes: 1) protection of natural vegetation and provision for revegetation and erosion control where it is disturbed; 2) timber disposal; 3) postconstruction site cleanup; 4) fire protection, suppression, and damage; 5) indemnification of the United States for damages from uses under the permit; 6) protection of existing permittees; 6) reservation of the right to issue additional permits for water storage; 7) protection of public access; 8) nondiscrimination in labor and use; 9) duration of permit and conditions of its renewal; and, 10) maintenance.

Special use permittees may be required to provide roads, parking areas, recreation facilities or other improvements to make the reservoir more compatible with other resource uses of Forest Service lands. 90/ Prior to submitting them to the regional forester for approval, regional engineers review plans for tunnels for problems concerning wastes draining from them and for erosion control around tunnel exits. 91/ Similar scrutiny is given canals, ditches, and flumes if they are potentially hazardous or may affect the functioning and operation of water storage and transmission projects or may cause erosion or bank cutting. 92/

All drilled wells for private domestic or commercial use must be capped when abandoned; such wells become the property of the United States. 93

Bonds in the minimum amount of twenty-five per cent of project cost plus one hundred per cent of debris disposal costs are required in the construction of all new projects or any construction to increase the capacity of any existing project.^{94/} This requirement is waived for public agencies not legally authorized to provide such bond.

Forest Service engineers inspect dams under Forest Service permit to insure their proper maintenance and to detect any evidence of danger or faulty operation of a water storage or discharge facility.^{95/} A dam may be withdrawn from service or water may be lowered or drained to permit repairs to be made. Minor FPC licensed projects subject to Forest Service field responsibility, all projects under Department of Interior easements which are not continually supervised by Interior agencies, and all dams owned by Forest Service or authorized by its special use permits except those classed as low hazard are inspected annually and after major storms, unusually heavy runoff, or earthquakes.

Not until the Reclamation Act did Congress authorize the Federal Government to plan, construct and maintain dams and irrigation works on the scale described later in this chapter. By that time formerly public land had already passed from Federal ownership.^{96/}

The 1890 Act does not specify the executive official who is authorized to make such reservations, but at the time that it was enacted only the Secretary of Interior could have been intended to exercise such authority. Inasmuch as the right created is one in favor of the Federal Government as owner of the lands involved, the legal interest in lands created is not an easement but a reservation. The Federal character of the beneficiary of this legislation also explains why no limitation on the amount of land which may be reserved pursuant to it is imposed or any price or other conditions attached to such reservations. By Act of September 2, 1964, ^{97/} Congress authorized payment of just compensation including severance damages to owners of any private lands utilized for ditches and canals commenced after January 1, 1961, in connection with any reclamation project, regardless of any reservation to the United States under the 1890 Act.

Because much desirable land had already passed from Federal ownership by the time the Reclamation Act of 1902 was passed, this Act provides other means of obtaining lands for this purpose. One such means is the provision for further withdrawal of lands from the public domain for reclamation purposes. The other means provided is use of Federal power of eminent domain to acquire suitable lands. The right of the Federal Government to use lands subject to disposal to private persons for settlement and agricultural production is assured by the Act of December 5, 1924 98/which authorizes the Secretary of Interior to reserve a right-of-way or easement of any kind to the United States over public lands withdrawn for reclamation purposes in any patents subsequently issued to nonfederal entities acquiring such lands.

II. DISPOSAL, USE, AND OCCUPANCY OF PUBLIC LANDS FOR ELECTRIC POWER PURPOSES

A. Overview and Historical Development

The existing Federal legal system governing the disposal or use or occupancy of public lands for development, transmission, or distribution of electric energy consists of those early statutes expressly authorizing rights-of-way over public lands retained in Federal ownership for such purposes, the Federal Water Power Act of 1920 placing exclusive jurisdiction in the Federal Power Commission to license use of public lands retained in Federal ownership for hydroelectric water power development, and broad statutes making public lands available for industrial purposes generally or for public purposes generally through license, lease, or sale.

The electric power industry, public and private, is of enormous significance to the development of the economy in all parts of the nation. It is of particular importance in the western states which contain the vast majority of public lands. Many of these states, being arid, depend upon electric power not only to provide industrial and commercial employment and residential service to burgeoning urban and suburban populations, but also to pump water to irrigate vast quantities of land which supply the west and the nation with grain, produce, and fiber.

Statutes which time and technology have rendered of little present utility stand unrepealed. Other acts partially duplicate or conflict with each other's provisions. Resort to multiple administrative authorities which often serve incompatible constituencies is required to utilize contiguous lands required for power plant sites or transmission or distribution line rights-of-way.

While the vitality of the electric power industry appears to be such that it surmounts and often exploits this chaotic legislative pattern, all segments of the industry and citizens generally would benefit from Congressional clarification of its intentions and priorities regarding the use of public lands for electric power development.

A recent Federal study of the impact of utilities use on public and other lands describes the present and projected needs of the electric power industry for land incident to generation, transmission, and distribution of electric power.^{99/}

The need for sites for generation facilities varies depending on the method used to produce power. Methods of generating electric power in the United States in mid 1968 included hydroelectric, diesel-electric, steam turbine, fossil-fueled, and nuclear means. 100/ At that time there was a total of 277.4 million kilowatts installed generating capacity in the United States. 101/ At the end of 1965, 177,305,000 kilowatts installed capacity was owned by 300 investor-owned electric companies which produced approximately 77 percent of all the electric energy produced in the United States in that year. 102/

In 1964, the Federal Government owned 17 percent of the nation's installed generating capacity consisting of approximately 26 million kilowatt installed generating capacity. 103/ This represented approximately 45 percent of the nation's hydroelectric generating capacity. 104/ In 1967, the Bureau of Reclamation was operating 49 power plants with a total installed generating capacity of 6,953,000 kilowatts. 105/ The Corps of Engineers operated an additional six power plants at that time. 106/

Of the 277.4 million kilowatts installed capacity in existence in 1968, some 219.1 million kilowatts or approximately 70 percent of it was produced by steam-turbine, fossil-fueled, or nuclear generated means. 107/ While nuclear-fueled generation capacity at that time accounted for only three million of the 219 million kilowatts, nuclear power is expected to account for a quarter of the over 600 million kilowatts installed generating capacity in the United States by 1980. 108/ By the year 2000 most new large generating plants in areas not close to low cost hydroelectric or fossil-fuel power sources will be nuclear-fueled except for supplemental plants used to supply peak power demands. 109/

In mid 1968 over 3,000 separate generating plants, most of them fossil-fueled, existed in the United States. Only about 140 of them had a total installed capacity exceeding 500 megawatts. The trend in plant size is toward larger plants or the location of multiple smaller generating units on a single site in order to reduce capital and operating costs. 110/ Generating unit sizes are expected to double by 1978 or 1983. The size of fossil-fueled generating plants depends upon whether coal, gas, or oil is burned; 64 percent of such plants utilize coal fuel, 27 percent gas fuel, and 9 percent oil fuel. The study estimates that a 3,000 megawatt coal-fired generating plant may require 900 to 1,200 acres of land whereas a plant of comparable capacity would require only 150 to 350 acres if gas fired. 111/ The larger area for coal-fueled plants is required for coal storage and ash disposal. All fossil-fueled plants, however, require space for cooling towers or spray ponds to dissipate the heat generated

incident to power production. Estimates for 1990 project a need for 164 new sites for fossil-fueled generating plants of 500 megawatts or more capacity. 112/ By that time sites for 91 nuclear power plants will be required. The Pacific-Northwest region served by hydroelectrically generated power transmitted by Bonneville Power Administration is expected to require at least one new thermal plant annually between 1975 and 1985. 113/ Such plants are large and also require space for water cooling structures to dispell heat generated incident to power production.

Electric power transmission and distribution lines are built to connect new generating plants with existing transmission systems, to enlarge transmission capacity to load centers and major distribution areas, and to provide interconnections between utility companies or between regional groups of companies. For purposes of recommending policy concerning their underground location the Working Committee on Utilities report distinguished transmission facilities from distribution facilities. 114/

"Electrical distribution facilities" included "all electric lines and associated facilities of 35 kilovolt capacity or less;" apparently lines and associated facilities exceeding 35 kilovolt capacity are "electrical transmission facilities." If this distinction is a valid one for general purposes as well, 115/ it may sharpen understanding of terms of common usage in the electrical industry used in Federal statutes. In any case, it is necessary to keep this distinction in mind in interpreting the figures which derive from the Working Committee on Utilities report.

In mid 1968, electric power transmission lines in service totaled 300,000 miles of lines occupying nearly four million acres of land; 235,000 miles of these lines had capacity of 69 and 200 kilovolts, the balance being extra high voltage capacity lines. 116/

The trend during the next quarter century before 1990 is toward substantial increase in extra high voltage transmission lines, reducing the total number of miles of overhead lines, requiring wider rights-of-way, and more massive and higher towers, permitting greater distance between generation site and load center, and encouraging multiple company use of lines to reduce overhead costs of supplying service. 117/

The Working Committee's report estimates that by 1990 there will be a total of 500,000 miles of transmission lines, only 335,000 of which will be below 200 kilovolt capacity, requiring about 7,100,000 acres of land.

Overall average width of right-of-way will be 142 feet per single circuit line; multiple line rights-of-way will be wider. Extra high voltage lines require rights-of-way at least 200 feet wide. Testimony by a Department of Interior representative at recent hearings 118/ indicated that large power lines (750 or 1,000 kilovolts) can utilize the same rights-of-way occupied by smaller lines they replace and that a 500,000 volt line requires only a 10 foot wider right-of-way than a 230,000 volt line.

B. Existing Federal Statutes Enacted to Authorize Use and Occupancy of Public Lands for Nonhydroelectric Power Purposes

The earliest 119/ legislation enacted to authorize use of public lands for electric power purposes is the Act of May 14, 1896, 120/ which empowers the Secretary of the Interior to "permit the use of right-of-way" upon "public lands and National forests of the United States" for the purposes of "generating, manufacturing, or distributing electric power." Those eligible to obtain such permission are "any citizen or association of citizens of the United States." The Act limits the size of such right-of-way to "the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres." It is not clear whether twenty-five feet refers to the maximum length or the maximum width of the right-of-way conferred.

This act supplemented the Act of January 21, 1895, 121/ described earlier in this chapter 122/ in conjunction with water storage and transmission for use by citizens or associations engaged in "the business of mining or quarrying or of cutting timber and manufacturing lumber or for the purposes of furnishing water for domestic, public, and other beneficial uses." In such context the act strongly suggests that the generation or distribution of electrical power authorized by it was intended for private industrial or local community use, and not for commercial power production and distribution generally.

Congress did not expressly repeal the 1896 Act in either of the two Acts subsequently providing for electric power rights-of-way over public lands. However, it would appear to have been superceded and to have been impliedly repealed by the Act of February 15, 1901 which encompasses all authorization contained in the earlier act and broadens its applicability as respects administering agency, width of right-of-way, description of lands subject to such use, and entities eligible to use them. 123/ The 1901 Act also imposes certain express conditions and restrictions upon the use of public lands for electric power purposes, however, that do not appear in the earlier act.

No reference to the 1896 Act is contained in current agency regulations or manuals concerning rights-of-way for electric power purposes. This further suggests that the Act, if not repealed is nevertheless not presently utilized for such purposes.

Two Federal statutes, the Act of February 15, 1901, 124/ and the Act of March 4, 1911, 125/ provided the basic Federal statutory authorization for the use of public lands for the purposes of generation, transmission, and distribution of electrical power from the dates of their enactment until passage of the Federal Water Power Act of 1920, which is presently incorporated as part one of the Federal Power Act of August 26, 1935. 126/

The 1901 and 1911 Acts differ in important respects, including the variety of uses for which rights-of-way are authorized, scope of electrical power rights-of-way obtainable, authorized width of right-of-way available, interest, tenure, and termination provisions, lands subject to right-of-way, and administrative officials authorized to implement them. These differences would appear to dispose of any argument that the latter act was meant to supercede the former.

C. Particulars of the Statutes

1. Agencies and Applicant Eligibility

a. The Act of February 15, 1901. The executive officials authorized to implement the Act of February 15, 1901 include the Secretary of the Interior and the Secretary of Agriculture.

The Act authorizes rights-of-way through the "public lands, forest, and other reservations of the United States," for "electrical plants, poles, and lines for the generation and distribution of electrical power."

"Those eligible to obtain rights-of-way under the statute include citizens, associations, corporations of the United States and state and local governments. Federal agencies obtain rights-of-way over lands administered by another federal agency where such agency gives its consent by memorandum of agreement or notation on public records." 127/

The maximum size of the right-of-way is limited by statute to the extent of the ground occupied by water plants, electrical or other works authorized plus a maximum of fifty feet on each side of the margin of such works and a maximum of fifty feet on each side of the center line of any electrical lines and poles.

The Act precludes the holder of a right-of-way from obtaining any interest in the land traversed under it, declaring that any permission given by the Secretary of the Interior or the Secretary of Agriculture under it "may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park." This language has been interpreted to confer a license to use public lands.

The terms of the statute are silent respecting payment for the right-of-way.

The only conditions imposed on the license by statute are prior approval of the chief officer of the department responsible for supervision of the lands concerned and a finding by him that such use is not incompatible with the public interest.

b. The Act of March 4, 1911. The executive officer authorized to permit the use of public lands for rights-of-way, under the Act of March 4, 1911 may be the head of any Federal department having administrative jurisdiction over the lands concerned.

Lands over which the Act authorizes rights-of-way are "public lands and reservations of the United States." They may be used for "electrical poles and lines for the transmission and distribution of electrical power."

Those eligible to obtain rights-of-way under the statute are citizens, associations, and corporations of the United States. As is the case under the 1901 Act, no provision is made for public entities, Federal or local, to obtain such rights-of-way. The remedies for such entities are the same under both Acts. 128/

The maximum size of such right of way is limited by the statute to two hundred feet on either side of the center line of electrical lines and poles.

The interest granted by the Act is designated to be an easement, limited in duration to a maximum period of fifty years and subject to forfeiture or annulment by declaration of the head of the department which granted it if it is not used for two years or if it is abandoned.

No provision concerning payment for the easement granted is contained in the Act.

The only conditions attached to the grant of the easement are the conditions precedent of approval of the chief officer of the department controlling the lands over which the easement is sought and his finding that such use is not incompatible with the public interest and the condition subsequent of continued use.

The Act authorizes holders of rights-of-way for lines and poles for transmission and distribution of electrical power obtained under any Federal law antedating it to surrender such privilege in exchange for an easement under its provisions.

c. Implementation of the 1901 and 1911 acts by the Bureau of Land Management of the Department of the Interior. Authority given the Secretary of the Interior under the 1901 and 1911 statutes has been redelegated by him to the Bureau of Land Management, which administers these acts pursuant to regulations promulgated by the Secretary. 129/

More specifically, the Bureau of Land Management exercises the authority conferred under the 1901 Act to issue licenses for use of all public lands and reservations other than forest reservations for purposes of generation, transmission, or distribution of electric power.

Lands administered by bureaus within the Department of the Interior are treated as if they were reservations administered by an agency outside the Department for purposes of Department of the Interior regulations. 130/ These regulations require agency approval of applications filed with the Bureau of Land Management for rights-of-way over land withdrawn for use of that agency. 131/ The criteria which guide these agencies in giving or withholding such approval are discussed later in this chapter.

For purposes of both acts, reservation lands include acquired lands. 132/ And Lands available for rights-of-way under either act include both surveyed and unsurveyed lands. 133/

Department of the Interior regulations recite the further reduction in scope of the Bureau of Land Management authority under the 1901 and 1911 Acts caused by the Federal Water Power Act of 1920, and refer applicants for sites for hydroelectric power projects for the generation and rights-of-way for main or primary transmission lines for hydroelectric power to the FPC. 134/

2. Acreage

The Department of the Interior regulations under which the Bureau of Land Management implements the Acts of 1901 and 1911 recite the limitations on the maximum size of license or easement respectively which may be granted under each act. 135/

The actual size of the right-of-way granted under either Act may, however, be considerably smaller. The regulations provide that rights-of-way for power lines will be limited to fifty feet on each side of the center line unless a greater width is justified and authorized by law. 136/ Such authorization is readily available for power lines under the 1911 Act which allows up to two hundred feet on each side of the center line. However, the regulations specify that any application under the 1911 Act for a right-of-way in excess of one hundred feet in width must satisfactorily demonstrate the need for a wider right-of-way before it will be granted. 137/

If evidence of the need for such is satisfactorily demonstrated, additional rights-of-way for purposes of ingress and egress to the primary right-of-way necessary to use, operate or maintain the primary right-of-way and any improvements placed on it may be obtained by an applicant under the Acts of 1901 or 1911 in the same application filed for primary right-of-way or by additional separate application made for such purpose. 138/

Authorization of a right-of-way wider than those permitted under the 1901 or 1911 Acts, can, where justified, be granted in the discretion of the Secretary as exercised through the Bureau of Land Management by issuance of a special use permit. 139/

3. Interest and Tenure

Little concern with the legal or practical distinctions incident to the interest in public lands, if any, obtainable under the Acts of 1901 and 1911 is reflected in Department of the Interior regulations.

Although statutory language of "permit" and "easement" is incorporated in the paraphrase of the 1901 and 1911 Acts set forth in the regulations, for purposes of describing general guidelines applicable to administration of lands for such use, the regulations and the Bureau of Land Management Manual lump "license," "easement" and "site" under the general label of right-of-way. 140/ A "special use permit" may be authorized for electric power purposes only where no statute authorizes the proposed use or where the applicant cannot qualify under such a statute.

Nor is tenure given much consideration as such in the Department of the Interior regulations or the Bureau of Land Management Manual.

The fifty year maximum statutory duration of an easement under the 1911 Act is recited in the paraphrase of the Act set forth in the regulations. 141/ No attention is drawn to the fact that while the 1901 Act confers only a license revocable at any time the Bureau of Land Management determines it to be in the public interest to do so, the duration of such license could last indefinitely.

Termination of an easement under the 1911 Act occurs naturally at the expiration of its maximum fifty year period or of a lesser period specified in the easement, unless the grantee applies for its renewal during the year preceding such expiration date in which case a second period of up to fifty years may be authorized. 142/

Termination under the 1911 Act may also occur through forfeiture or annulment of the easement for abandonment or nonuse of the right-of-way for two years.

Termination of a license issued under the 1901 Act may occur whenever the Bureau of Land Management exercises the discretion which the Act gives to the Secretary to revoke it.

In addition to such provisions, however, Department of the Interior regulations applicable to rights-of-way generally provide for cancellation of rights-of-way issued under either Act for the violation of any of their provisions or the terms or conditions of the right-of-way. 143/

4. Price and Related Terms

No provision for payment for use of public lands for electric power rights-of-way is made in either the 1901 or 1911 Acts. However, Federal courts have upheld the right of the authorized administrative agency to make such charge a condition of the grant. 144/

Regulations of the Department of the Interior provide that the charge for use and occupancy of lands for rights-of-way will be "the fair market value of the permit, right-of-way, or easement as determined by the authorized officer," and not less than \$25.00 per five year period of any of these forms of authorization. 145/ Such provision does not apply to charges imposed for water-power project rights-of-way issued by the Bureau of Land Management prior to the 1920 Act transferring jurisdiction for them to the FPC. 146/

Rights-of-way are issued free of charge where use and occupancy are "exclusively for irrigation projects, municipality operated projects, or nonprofit or Rural Electrification Administration projects, or where the use is by a Federal Governmental Agency." 147/

5. Rights, Restrictions, and Conditions

Both the 1901 and 1911 Acts concerning licenses and easements over public lands for electric power purposes contain authority for administrative regulation of such rights-of-way. Both delegate to the appropriate executive official discretion to allow or refuse use of public lands for such use. More emphatically, each makes it a condition precedent of such allowance that the chief officer of the Federal department controlling such lands approve issuance of a right-of-way and render a finding that such use is not incompatible with the public interest. 148/

Land administering officials do not hesitate to use this authority to preclude location of electric power facilities where they would impair other values. 149/

As a means of implementing its responsibility under all Federal statutes authorizing rights-of-way over public lands and the objectives of the Multiple Use and Classification Act the Department of the Interior has promulgated regulations setting forth conditions with which all applicants for rights-of-way must agree to comply in order to such privilege. 150/

These are set forth in detail in Chapter III. 151/ They include among the conditions relevant to use of public lands for electric power purposes the obligations to:

- (1) Clear and maintain such right-of-way clearing as required to reduce fire hazards;
- (2) Observe the necessary measures to conserve and protect soil and other resources;
- (3) Utilize independent and cooperative means to prevent and suppress fires on or near the right-of-way;
- (4) Build and repair any roads and fences injured in constructing the right-of-way and build suitable crossings where the right-of-way intersects such roads;

- (5) Pay for damages to lands caused by construction, and to indemnify the United States against any liability for damages to life, person, or property arising from occupancy or use;
- (6) Refrain from discrimination in employment; and
- (7) Offer no interference with management of lands subject to the right-of-way by the United States.

Grantees of rights-of-way for electric transmission lines of any capacity must agree to protect all telephone, telegraph, and power transmission lines from contact at crossings and places in proximity to his transmission lines, and to protect all highways and railroads from obstruction, and to maintain his lines so as not to endanger life or property. 152/

In addition there are standard procedural requirements which must be observed before a right-of-way will be allowed. These concerning making application, payment of fees, proof of construction, transfer of rights-of-way, and restoration of lands upon termination of the right-of-way. 153/

In addition to the standard and special conditions imposed pursuant to Department of the Interior regulations, the Bureau of Land Management adjudication officer processing applications for rights-of-way for electrical power purposes requests the recommendation of Federal agencies having an interest in the lands concerned regarding grant or denial of the right-of-way and any special stipulations required to protect the lands for its purposes. 154/

Where the lands over which a right-of-way has been issued are administered by the Bureau of Land Management, the Bureau of Land Management classification officers assume responsibility for making inspections necessary to ensure compliance with its conditions unless the right-of-way is of a nature that periodic inspection is required to protect resources, such inspections are limited to instances where construction would involve substantial disturbance of natural resources or other values, where proof of construction as filed is doubted, where credible sources have reported damages or violations of conditions, and compliance with termination provisions of the grant and applicable regulations must be ascertained. Where lands over which the right-of-way is granted are administered by another Federal agency, it is the responsibility of that agency to secure compliance with conditions of the grant.

The conditions and procedures thus far described rarely are the source of controversy between the grantee and the United States. 155/

6. "Wheeling"

It is the regulations imposing special conditions, however, upon the grant of rights-of-way for electric transmission lines of 33 or more kilovolt capacity that are the focus of present opposition from investor-owned electric utility companies. These regulations were promulgated by the Department of the Interior on March 23, 1963, at which time the Department of Agriculture adopted comparable provisions. 156/

According to these regulations, grants of rights-of-way for a facility to generate electric power or to transmit or distribute electric power of 33 or more kilovolts are authorized only by the Secretary of the Interior after he determines the proposed structure will not conflict with the "power-marketing program of the United States," or where plans for it can be modified to eliminate such conflict. 157/

Such grant then issues only subject to the following additional conditions. The Department of the Interior reserves the right to determine or to invoke arbitration to determine whether the applicant's transmission or other facilities 158/ have "surplus capacity" (i.e., transmission capacity in excess of that needed by the grantee for his operations). 159/ The Department may use such surplus capacity or increase the capacity of the facility at its expense to create surplus capacity to transmit electric power to statutory preference customers of Federal power but not to persons receiving service from the grantee on the date he applied for the grant. In order to do so the Department may at its own expense and with protective equipment adequate to protect the grantee's normal operation interconnect its transmission facilities with the grantee's pursuant to approved standards for such practice. 160/ After such interconnection the grantee must maintain and operate its transmission facilities in good condition but, except in emergency or by mutual consent it may not utilize the capacity devoted to transmitting Federal power. 161 In return for this condition, the Department pays the grantee "an equitable share of the total monthly cost of that part of the holder's (grantee's transmission facilities utilized by the Department for the transmission of electric power and energy," the payment to represent "the proportion of total monthly cost of such part of the transmission facilities as the maximum amount in kilowatts of the power transmitted on a scheduled basis by the Department over the holder's (grantee's) transmission facilities bears to the total capacity in kilowatts of that portion of the

transmission facilities." If the grantee later needs any part of the surplus capacity used by the Department, he may request its release by giving 36 months notice in advance of revocation or modification of the prior determination.162/

Application of these regulations may be waived by the Department of the Interior where they are superceded by a specific contract between the utility and the power marketing agency.163/

Objections to these regulations by the various investor-owned electric companies are made on constitutional, equitable, technological, and tactical grounds. Inasmuch as many of the same objections have been asserted in various forums during the past twenty years, it is desirable to trace the evolution of the present regulations, the reasons for their promulgation, and the grounds on which opposition to them is taken by private utility companies.

The Department of the Interior has on occasion described these regulations as primarily a matter of conservation.164/ However, a second purpose of these regulations is to assure the transmission of electric power generated at Federal dams165/ pursuant to various acts which provide at reduced rates much of the energy used to meet rural and municipal needs.166/ The sale of surplus electric power by the Secretary of the Interior provides almost sixty percent of the revenue required for reimbursable costs of Federal reclamation projects.167/ Rural electric cooperatives, one class of statutory preference customer under these acts, are economically feasible in large part because they purchase approximately forth percent of their total energy requirements from the United States.168/

While Federal involvement in the generation and transmission of electric power began inadvertently, 169/ its magnitude greatly increased during the years of National depression and the second world war.

Federal generation of electric power began as a by-product of the vast reservoir complex constructed by the Bureau of Reclamation pursuant to the Federal reclamation laws.170/ At first any electric power developed by reclamation project works was utilized to pump water needed for irrigation.171/ The basic Reclamation Act of 1902, 172/ was amended in 1906, 173/ to permit the sale with preference to municipal purposes of surplus reclamation project power and to credit revenue from it after repayment of power costs, installation operation, and upkeep of power facilities to the reclamation fund to repay that portion of irrigation costs beyond the ability of the water user to pay.174/ The Federal Water

Power Act of June 10, 1920, contained provisions whereby the FPC might recommend to Congress that the Federal Government develop a hydroelectric power site itself. 175/ But not until the Boulder Canyon Project Act of 1928, 176/ did Congress expressly authorize construction of a truly multipurpose water development project with provision for generation and disposal of electric power to repay the cost of project facilities. 177/

A substantial addition Federal commitment to generation of electric power was the Tennessee Valley Authority Act of 1933, 178/ which provided for sale of surplus power to preferred customers and construction of transmission lines and interconnection facilities or other arrangements to distribute power to them.

The Bonneville Project Act of 1937, 179/ authorized increased construction or other arrangements for electric transmission facilities to interconnect the Bonneville project and other Federal projects with publicly owned power systems in order to encourage the widest possible use of electric energy that could be generated and marketed, to provide reasonable outlets for it, and to prevent monopolization of it by limited groups.

The Federal Government became increasingly involved in the generation of electrical power when Congress enacted the Flood Control Act of 1936, 180/ authorizing the Corps of Engineers to construct large reservoirs and other facilities for flood control and reclamation of land by drainage. 181/

The Fort Peck Act of 1938, 182/ gave the Bureau of Reclamation authority like that of the Bonneville Power Administration to provide or construct transmission facilities and to interconnect Federal projects with both publicly and privately owned power systems.

The Reclamation Project Act of 1939, 183/ amended earlier reclamation laws to recognize the importance of multiple purpose use of Federal reclamation projects generally for purposes of providing electric power and municipal water, for improvement of navigation, for fish and wildlife conservation and for flood control, in addition to the primary purpose of irrigation and the allocation of nonreimbursable funds for such purposes. 184/

The Flood Control Act of December 22, 1944, 185/ recognized the generation of hydroelectric power as a legitimate incidental purpose of flood control structures constructed throughout the United States by the Army

Corps of Engineers, and authorized the Secretary of the Interior to construct or acquire transmission facilities necessary to make such power available for sale to electric systems owned by Federal, public, cooperative or private utilities.

In addition to Federal involvement in the construction of hydroelectric power generation and the provision of means for transmitting it to various customers, the Federal Government, through the AEC, licenses nuclear facilities which generate electric power and markets such power. 186/

The Department of the Interior and Agriculture consider acts 187/ such as these to constitute the "Federal power marketing policy" referred to in the 1963 regulations. A memorandum of agreement between these two departments dated March 15, 1964, 188/ concerning implementation of the 1963 regulations defines this policy as:

"undertakings by the Department of the Interior, necessary or appropriate for the purpose of making electric power and energy at Federal multipurpose projects constructed by the Bureau of Reclamation or by the Corps of Engineers, available in wholesale quantities to agencies designed by existing law as preference agencies and to other purchasers of electric power and energy at wholesale, or for the purpose of interconnecting those projects with other electric facilities, pursuant to the Bonneville Project Act, the Reclamation Act, the Reclamation Project Act of 1939, the Flood Control Act of 1944, or other applicable marketing authorization."

Prior to promulgation of the 1963 regulations which first made conflict with "Federal power marketing policy" a ground for denying the use of public lands for a right-of-way for electric transmission lines, the existence of a comparable policy derived from the statutes described above, was noted by the House Government Operations Subcommittee, which observed:

These statutes set forth the congressionally enacted policy governing the disposal of power generated at Federal dams. They provide without exception that in the disposal of such power, preference shall be given to public bodies and cooperatives. No principle has been more firmly established, whether the majority in the Congress enacting the laws was Democratic or Republican. Every reasonable person must agree that the history of repeated enactments of the preference clause can only mean that Congress intends definitely,

firmly and beyond doubt, that Federally generated power shall be sold to public bodies and cooperatives where reasonably possible and that the executive departments shall act affirmatively to achieve that end. This principal, designed to preserve the benefits of the Federal projects for the people and to serve as a buffer against a private power monopoly, is a keystone of Federal power policy.

Almost as firmly established is the principle that the responsible Federal agencies can and should transmit or secure the transmission of Federally generated power to points where the public bodies and cooperatives can pick it up. Indeed, without such transmission, the preference clause would be largely meaningless.

There are four power marketing agencies within the Department of the Interior: the Bureau of Reclamation, the Southwestern Power Administration, the Southeastern Power Administration, and the Bonneville Power Administration.^{189/} For purposes of example, the operations of the Bonneville Power Administration (BPA) are instructive. BPA markets power from over 28 Federal dams in the Pacific-Northwest region built and operated by the Army Corps of Engineers and the Bureau of Reclamation.^{190/} It operates the regional backbone transmission grid which distributes over transmission lines which it has built which represent about 80 percent of the region's transmission capacity, approximately half the total power generated in the Pacific-Northwest.^{191/}

Electric power transmitted by BPA is distributed among 145 customers including publicly owned utilities, investor-owned utilities, cooperatives, and a few large electroprocess industries which serve 5 and 1/2 million persons in an area including all of Washington, Oregon, and Idaho and parts of Montana, Wyoming, Utah, and Nevada. BPA is the regional wholesaler and transmitter (wheeler) of electric energy connecting all systems and assuring supply of small and isolated utility systems; local distribution of power is handled by the various utilities.^{192/}

In addition to providing transmission facilities for the Pacific-Northwest region, BPA participated in the construction of the Northwest-Southwest intertie consisting of four major transmission lines constructed by the Federal Government and public and private utilities connecting the large Columbia River dams with Los Angeles and the Hoover Dam to serve eleven western states.

It is not practical or economical for BPA or other Federal power marketing agencies^{193/} to construct transmission facilities to transmit Federally generated power when this might be done over existing or scheduled non-Federal transmission facilities.^{194/} The Bonneville Act,^{195/} Fort Peck Act,^{196/} and Flood Control Act of 1944,^{197/} authorize the agencies to make other arrangements for this purpose by interconnecting Federal transmission facilities with non-Federal facilities. In return Department of the Interior policy is to make surplus capacity in its transmission lines available to others.^{198/}

However, testimony given before the House Government Operations Subcommittee in 1954 indicated that by 1946 the Secretary of the Interior encountered increasing resistance to wheeling Federal power from privately owned utilities generally.^{199/} Such resistance became critical in several areas by 1948. In Idaho the Idaho Power Company refused to wheel Federal power needed for phosphate development on public lands over the excess capacity of a 230 kilovolt line which it allegedly proposed to build over such lands in order to forestall construction of such a line by the Bureau of Reclamation and the Bonneville Power Administration.^{200/} In California the Pacific Gas and Electric Company refused to wheel power from the Shasta Project to Federal preference customers.^{201/} Similar problems occurred in Montana, North Carolina, and Georgia.^{202/} Meanwhile high capacity transmission lines were being constructed by private utilities to transmit Federally generated power to their own customers.

In order to compel private utilities to allow use of their lines to transmit Federally generated power to Federal preference customers, the Department of the Interior promulgated the first "wheeling" regulation in 1948,^{203/} providing that:

Upon such terms and conditions and in such manner as the regional administrator may direct, to permit the government or any agency or instrumentality thereof, hereinafter referred to as the Government, to interconnect its transmission facilities with the transmission line for which a permit is requested forms a part; to construct, operate, and maintain such line and all related facilities, wherever situated, in such manner and condition as to make available to the Government the effective use of such line for the transmission of electric power and energy in such manner and for such amounts as will not unreasonably interfere with the permittee's use of the line; and to permit the Government to so use

the line in accordance with terms and conditions agreed upon by the regional administrator and the permittee, including the terms upon which the Government will pay its proportionate share of the monthly cost of the lines.

In 1949, 204/ the earlier regulation was amended. Its application was limited to 33 kilovolts. It provided generally that upon certification by any permittee that excess capacity existed in any transmission line constructed over lands included in the permit, the Department of the Interior of the United States would be allowed to utilize such excess capacity for transmission of its electric power. If no excess capacity was certified, the existing capacity of the line might be increased at the Government's expense and the increased capacity utilized by the Department of the Interior. The Department agreed to make any necessary interconnections in conformance with approved standards of practice and to bear the proportionate cost of maintaining and operating the line after interconnection. It agreed that its transmission would be effected in a manner that would not interfere unreasonably with the permittee's operation of the line and that the permittee would not be obligated to allow transmission over its lines by the Department of electrical power to any person receiving services from the permittee on the date of filing the application for a permit, other than persons entitled to statutory preference. It provided that if, at any time subsequent to the certification by the easement holder that surplus capacity was available for utilization by the Department, the easement holder needed the whole or any part of the capacity previously certified as being surplus to its needs, it might revoke or modify the previous certificate by giving the Secretary of the Interior 30 months notice in advance of its intention in this respect. After the revocation of a certificate the Department's utilization of the particular line would be limited to the increased capacity, if any, which it had provided at its expense. The regulations also provided for reciprocal accommodations permitting the easement holder to transmit electrical power over the interconnecting system of the Department.

All of these terms and conditions could be modified at any time by means of a supplemental agreement negotiated between the parties.

Whether these regulations deterred privately owned electric utility companies from seeking transmission line rights-of-way while they were in effect is disputed. 205/ At least 84 rights-of-way containing the wheeling stipulation were executed between 1948 and 1954. 206/ However, the Department of the Interior has no knowledge that the United States actually exercised any of the wheeling rights secured thereby. 207/ It would appear

that no exercise occurred. The only judicial decision rendered concerning these regulations dismissed an action for a declaratory judgement of their invalidity on the alternate ground that no occasion had arisen for application or enforcement of the regulations.208/ This action was brought after the Solicitor of the Department of the Interior affirmed Bureau of Land Management refusal to waive application of these regulations to petitioner's application under the 1911 Act for a right-of-way across public lands in Oregon.209/

Throughout this same period pressure from Congress on Federal power marketing agencies to utilize wheeling arrangements to transmit Federal power in lieu of building Federally owned transmission lines increased. During the Korean War emergency Congress attached a rider to the Interior Department Appropriation Act of August 31, 1951,210/ providing in pertinent part:

. . . That no part of this appropriation shall be used to initiate the construction of transmission facilities within these areas covered by power wheeling service contracts which include provision for service to Federal establishment and preferred customers, except those transmission facilities for which construction funds have been heretofore appropriated, those facilities which are necessary to carry out the terms of such contracts or those facilities for which the Secretary of the Interior finds the wheeling agency is unable or unwilling to provide for the integration of Federal projects or for service to a Federal establishment or preferred customer . . .

The purpose of this provision was the "saving of Federal funds and critical materials needed for the defense effort."211/ It was also intended to avoid duplication of transmission facilities.212/

On August 11, 1954, the Acting Secretary of the Interior amended the 1949 regulations by completely eliminating the wheeling requirement.213/

An investigation of this action conducted in 1954 by the House of Representatives Subcommittee on Government Operations revealed that the need for wheeling regulations had not diminished and that its elimination had been costly to the Government and to its preference customers.214/ It recommended that the wheeling requirement be restored by statute.215/

Congress did not enact such legislation, however, despite the introduction of numerous bills providing for it.216/ However, the Department of the

Interior and the Department of Agriculture proposed the present right-of-way regulations to restore the wheeling requirement which were adopted on March 23, 1963, after hearings at which testimony from the power industry and others was received.

Since enactment of these regulations neither the Departments of the Interior or Agriculture have rejected nor required modification of any application for a right-of-way over public lands on the ground that it conflicted with the Federal power marketing policy.^{217/} Application of the wheeling stipulation requirement continues to be waived where the applicant has either a preexisting wheeling contract with the government or will enter into one in lieu of application of the wheeling regulations.^{218/}

Private electric companies have nevertheless challenged at the administrative level the requirement that a wheeling stipulation be made a condition of the issuance of a right-of-way for electric power lines. The Department of the Interior has affirmed this requirement in regards to a distribution line alleged to be of no practical value for transmission of Federal power over it^{219/} and in regards to a permit for which application was filed prior to enactment of these regulations in March 1963.^{220/} Probably because these facts preclude the existence of any genuine controversy which might be reviewed by Federal courts and because the creation of Public Land Law Review Commission has provided a new means for obtaining reconsideration of these regulations, no judicial review of the validity of these regulations has been sought. In 1965, the Department of the Interior agreed to accept the wheeling stipulation required by the regulations with the added reservation of the applicant of the right to challenge the validity of the regulations at a future time.^{221/}

The Constitutional objections raised in opposition to the 1963 regulations and their predecessors concerns existence of delegated legislative authority for their issuance. While the 1901 and 1911 Acts contain express authorization for the promulgation of administrative regulations to implement the use of public lands for electric utility purposes, they are silent concerning both the Federal power marketing policy and the right of the Federal Government to condition use of the public lands on transmission of Federal power by the grantee. Implied authorization of such provision is doubtful inasmuch as enactment of these statutes precede the existence of a Federal power program and Congress has not passed bills introduced to compel transmission of Federal power as a condition of the use of public land^{222/} after repeal of the 1949 regulation providing for this. The implication of the latter failure to act is not, however, weighty.

There appears to be divided sentiment in Congress concerning the mandatory wheeling provision controversy. As noted previously, the majority of the House Government Operations Subcommittee favored enactment of such provisions by statute so as to be less vulnerable to changes in administrative policy concerning them.223/ And a proposed Committee Resolution of the House Interior Committee recommending that the Departments of Agriculture and Interior withdraw or suspend the 1963 regulations was apparently never adopted.224/

The Supreme Court has upheld imposition of a wheeling requirement in an individual hydroelectric project works license issued by the Federal Power Commission under the Federal Power Act,225/ where at least one of its purposes was to protect public lands. Such purpose is also ascribed to the regulations issued by the Departments of Agriculture and Interior in 1963. Contemporary with their issuance, the Secretary of the Interior stated:226/

"The regulations are first a matter of conservation. We felt that it was important to set forth now the basic principle that where one transmission line crossing Government lands can do the job all reasonable efforts should be made to avoid additional lines. This principle is important when one considers the rapidly growing needs of the future for more and more transmission line facilities. The regulations were also issued so that the Department could carry out better its responsibilities for the marketing of power."

The avoidance of transmission line duplication is also a facet of the Federal power marketing policy227/ though not necessarily its most important feature.

The major purpose of the power marketing policy conflict provision has also been described as "giving the Secretary of the Interior the authority to withhold approval of an application because of conflict with the Federal power marketing program to avoid the anomalous situation of the Department of the Interior or Agriculture facilitating the construction of a line by granting a right-of-way over Government lands, which construction may interfere with a proper Government activity."228/

Access to a judicial forum is not promising because right-of-way statutes authorize, but do not require, the Secretary to grant a right-of-way easement and agency action, committed by law to agency discretion, is exempted from judicial review by express provision of the Administrative Procedures Act. 229/

The technological objections of the private electric companies to the 1963 regulations concern their effect on the ability of the industry to accurately forecast and fill systems reliability and future capacity requirements. The testimony of an electric company representative before the House of Representatives Subcommittee on Public Lands describes the problem posed for the industry by the requirement that the Federal Government be permitted to use surplus capacity of electric transmission facilities.230/ It is necessary to plan, design, and engineer utility system expansions and additions three, five, and ten years in advance of actual needs, depending on the type or character of plant under consideration. Reserve capacity is built into almost every plant facility for purposes of expanded services and reliable operation of the line or system under both normal and emergency conditions.231/ Flexibility of power flow is needed because load demands imposed by customers fluctuate materially on a daily, weekly, or seasonal basis as a result of temperature, weather, and other factors. Generating capacity also varies in accordance with normal maintenance requirements or outages and, in the case of hydroelectric facilities, in accordance with fluctuation in water supply. Utilities normally contract among themselves to supply any unexpected and intermittent demands on transmission capacity from a pool representing aggregate available capacity in order to avoid the expense of providing backup capacity for each member or system independently. This means that "surplus capacity" in a segment of an electric system represented by an individual transmission line cannot be viewed apart from the total demands to which it is already actually or potentially subject. For such reasons, it is suggested that any arrangements for wheeling Federal power over surplus capacity of private company lines should be made on an individual basis after careful consideration of factors such as anticipated electric loads, line capacities, diversity of systems, source of energy, transformation capabilities, and load characteristics.232/

There appears to be no necessary conflict between consideration of these factors and application of the Federal regulations concerning surplus capacity. The term is not defined in the regulations so as to exclude such consideration. Department of the Interior correspondence contemporaneous with issuance of these regulations indicates that "all needs of the holder, . . . take priority over the requirements of the Government,"233/ and that factors such as those suggested by the industry should be considered by the official or arbitrars determining the existence and amount of surplus capacity.234/

Other objections of the investor-owned utility companies address what they consider to be inequitable burdens imposed by the 1963 regulations. These concern the effect of the regulations on the markets for their services and the costs and profits involved in rendering them.

Although regulations provide that the grantee of the right-of-way is not compelled to allow transmission of electric power by the Department of the Interior to any person other than statutory preference customers (cooperatives, municipalities, and public bodies including Federal agencies) which it was serving on the date it applied for such grant, many private electric utilities fear that they will lose not only what statutory preference customers they may have had but also any non-statutory preference customers which they were not serving at that time. 235/

A closely related objection to the regulations is the fact that they do not clearly preclude the possibility that the grantee might be required to wheel not only power generated by the Federal Government, but also power which the Government markets as an agent for another entity such as a Rural Electrification Administration cooperative. 236/

The absence of any necessary correlation between the amount of public land traversed by the grantee and the proportion of his transmission system which may be subjected to the wheeling requirement under the regulations also appears inequitable to privately owned electric companies, despite the fact that technological constraints dictate interconnection at substation or interconnection points rather than where specific segments of transmission facilities cross public lands. However, the Department of the Interior has characterized as rare the situations in which a long stretch of line between terminals traverses only a small piece of Government land. 237/

The lack of provision for reciprocal wheeling by the Federal Government is also believed by some to be unfair. The Department of the Interior did not include such provision in the 1963 regulations 238/ because it "would prefer to deal with this matter at greater length and, more appropriately, separately-- especially since it raises problems related to the preference laws." 239/ However, it maintains, "In general, surplus capacity in the Department's transmission systems is available to others on an equitable basis and has been so used extensively over the years." 240/

The basis for compensating the grantee for surplus capacity reserved by the Federal Government is also alleged to be inequitable in the following respects:241/

The formula for computing payment by Interior for its use of capacity is ambiguous but appears to apply, to the total monthly cost of the Applicant Company's facility utilized, a ratio computed by dividing (a) the maximum amount in kilowatts of the power transmitted on a "scheduled basis" by Interior over the facility by (b) the total capacity in kilowatts of the facility. This formula, based on kilowatts only, makes no provision for payment for that portion of the capacity of the facility used for transmission of the wattless component of the electric current which accompanies the transmission of power, and which can place a greater burden on the facility than the real power. "Total monthly cost" in the formula is said to be governed by the Federal Power Commission Uniform System of Accounts but the assignment of costs, by location, to a particular segment of a transmission system on a monthly basis would require the establishment of more difficult and more complex accounting procedures than are now used or are required by the Uniform System of Accounts. Further, there is no indication that such important cost elements as return on investment, taxes and administrative expense would be included at all. The provision for establishing the ratio on the basis of that part of the facility actually used on a "scheduled basis" is not consistent with the requirement of Interior reserving for Interior's exclusive use an increment of capacity of the Applicant Company's facility. Such an exclusive reservation in regulated utility practice is normally paid for on an equitable basis, whether or not use is made of it.

Statements contained in Department of Interior correspondence contradict these criticisms. The Secretary has stated that "The payments by the Department for the use of the holder's facilities are intended to relate to all costs of the holder --- operation, maintenance, taxes, insurance, and depreciation --- in accordance with the accounting system of the Federal Power Commission or of the state commission having jurisdiction."242/ Moreover, "It would be expected that the Department would not insist on an applicant reserving capacity for the Department which it neither uses or pays for and does not permit the owner himself to use."243/

Tactical arguments made by investor-owned utilities concern the relative need for and results of compulsory, general, and unilaterally determined wheeling provisions. It is contended that mutual, individual contractual

agreements concerning wheeling are both possible and preferable. The Chairman of the Federal Power Commission expressed a fear that compulsory wheeling arrangements pursuant to the 1963 regulations might impede rather than foster power system coordination through the nation. 244/

Representatives of both the electric utility industry and the Department of Interior make frequent reference to the well established tradition of wheeling practices. Bonneville Power Administration 245/ and South-eastern Power Administration 246/ offer notable examples of highly coordinated operation of private, public, federal, and nonfederal power facilities achieved pursuant to voluntary agreements.

It appears that the Department of Interior would prefer to negotiate specific contracts for transmission of Federal power where this is possible. 247/ The primary purpose of the 1963 regulations is that "If the applicant were unwilling, however, to enter into an appropriate contract, then the regulations would stand and the Department would at least have something to work with." 248/

D. Rights of Way for Electric Power Purposes Over Lands Administered by Other Agencies in the Department of Interior

1. The Bureau of Reclamation

In addition to use of reclamation lands for electric power development by the Federal Government itself, such lands are available to nonfederal entities, public or private, for rights-of-way for electric power purposes under the 1901 and 1911 Acts. Bureau of Reclamation policies affect the issuance of such rights-of-way. Transmission lines are usually authorized by "license", although the Bureau of Reclamation may, with the consent of the water-users organization, execute perpetual easements except where development and transmission of electric power and energy of over 100 kilovolts is involved. An easement for transmission of energy over 100 kilovolts capacity must be submitted by Commissioner of Reclamation to the Secretary of the Interior for approval. 249/

The consent of the water user organization involved must be obtained for any easement proposed for a term of 25 years or longer. 250/

2. The National Park Service

Applications for rights-of-way for electric power purposes over recreational areas in National parks must be anticipated because of

the large size of such areas, their proximity to urban areas, their allowance for areas of privately used land interspersed with lands acquired for recreational purposes, and their not infrequent connection with multiple-purpose Federal water impoundments.

Use of any National park or National monument lands for the location of powerhouses, transmission lines or any works including dams and reservoirs for development, transmission or utilization of hydroelectric 251/ power is entirely prohibited unless prior authorization from Congress for them is specifically obtained.

Rights-of-way for electric power purposes over such lands under the 1901 or 1911 Acts obtainable from the Secretary of Interior are available upon application to the Director of the National Park Service pursuant to Department of the Interior regulations. 252/ Such rights-of-way are ordinarily allowed "only on a showing of absolute necessity," and then only where the proposed location and use will not interfere with the uses or purposes to which the park or monument was originally dedicated and will not injure the natural conditions of existing property or scenery in it. 253/

National Park Service policy governing physical development permitted on recreational areas authorize rights-of-way from public roads across Federal lands to private lands within recreational area boundaries for purposes of access and, where this is practical, permits private parties at their own expense to provide for utility lines, preferably underground which are reasonably necessary for them to use and enjoy their property. Plans for such construction must be approved by the National Park Service.

Public utility line rights-of-way are not permitted in wilderness areas. Areas in which power or multiple purpose water development projects have been authorized by statute will not be recommended to Congress by the National Park Service for inclusion as wilderness areas under the Wilderness Act unless such authorization is eliminated.

Where utility lines are necessary for National park purposes, National Park Service policy is to include them in the transportation corridor whenever possible and to place them underground except where this would cause excessive damage to the natural ecology of the area. Except where they involve existing rights recognized in legislation or agreements prior to the establishment of a natural area, or where they are authorized as being clearly in the national interest after all reasonable alternatives have been exhausted, the installation of electric power transmission lines and other structures not directly related to National

park management and visitor use is discouraged and are eliminated as rapidly as possible. When electric power transmission lines are authorized, the rights-of-way regulations of the Department of the Interior governing them apply and comparable fees are assessed for such land use.

3. The Fish and Wildlife Service, Bureau of Sport Fisheries and Wildlife

Department of the Interior regulations issued for the guidance of the Fish and Wildlife Service provide for economic uses generally and for electric utility rights-of-way in particular. This category of refuge land uses would appear to include any site or rights-of-way necessary for generation or transmission of electric power required for refuge administration purposes.

In particular, rights-of-way over wildlife refuge areas for electric power purposes are available under the 1901 and 1911 Acts, the Federal Power Act, and regulations implementing these acts. 254/ In addition revocable "permits" may be issued without statutory authorization to permit such use where it is in the public interest to do so and it will not interfere with the operation of the refuge. 255/ Such permits are conditioned upon compliance with applicable Federal laws and regulations, non-interference with wildlife refuge development, maintenance, and management, and any special terms and conditions imposed by the Bureau of Sport Fisheries or Bureau of Land Management which are not inconsistent with Federal law or regulation. 256/

The Field Manual of the Bureau of Sport Fisheries and Wildlife, Branch of Wildlife Refuges, provides that no formal right-of-way is required for the construction by the power company of a line across refuge lands if that line, after entering the refuge, is utilized only to service refuge facilities. 257/

Easements for utility rights-of-way are processed by the Bureau of Land Management in accordance with Bureau of Sport Fisheries and Wildlife regulations. 258/

Any other use of refuges by public or private organizations for such purposes of power lines will not be permitted without a lease, contract, special use permit, cooperative agreement or easement. 259/ Details concerning such proposed uses are submitted to the regional office of the Bureau of Sport Fisheries for approval after the refuge manager has carefully weighed the need for such use against its effect on the refuges and made specific recommendations concerning it. 260/

Where the charges for rights-of-way on wildlife refuge areas for electric power purposes are not already prescribed by law or Department of the Interior regulations, they will be determined at a rate commensurate with those fixed for similar privileges by private landowners in the vicinity and are payable annually or periodically in a lump sum. 261/ Regulations pertaining to economic uses of refuge areas generally also authorize payment of fees by a share of crop or vegetable products or by permitting grazing use pursuant to cooperative agreements of benefit to area wildlife management. 262/ Whether this policy might also be applied to payment for electric power rights-of-way if it were desired by the applicant is not clear.

E. Implementation of the 1901 and 1911 Acts by the Department of Agriculture

Under the 1901 Act the Secretary of Agriculture is expressly designated to permit the use of National forest lands for rights-of-way for electric power plants and for transmission and distribution lines. Until 1901 this authority over forest lands was concurrent with that of the Secretary of the Interior. The Secretary of Agriculture is also authorized as one of the heads of a Federal department to grant easements for transmission lines under the 1911 Act. 263/ Though this Act only refers to transmission lines, the Forest Service manual states that easements may be issued for utility sites as well. 264/

Except for permits and easements issued prior to enactment of the Federal Water Power Act of 1920, the administrative jurisdiction of the Secretary of Agriculture under both Acts is limited to generation sites for nonhydroelectric plants and to nonprimary transmission lines. 265/ Except in the case of "minor" hydroelectric project works where the Federal Power Commission has agreed to defer its licensing jurisdiction to the Department of Agriculture 266/ exclusive jurisdiction to license the use of public lands for hydroelectric power plants and for primary transmission lines lies with the Federal Power Commission. Primary transmission lines are lines transmitting power from the hydroelectric generating plant or appurtenant works to a point of junction with the distribution system or with the interconnected primary transmission system. 267/ Lines serving the same function from a thermal-powered generating plant are considered to be non-primary lines even though technically and functionally they are primary lines.

Authority under both Acts "has been delegated by the Secretary of the Department of Agriculture to the Chief of the Forest Service, who in turn has delegated it to the regional forester. 268/

Pursuant to the 1901 and 1911 Acts the Forest Service issues "permits", "easements", and "special use permits" to authorize rights-of-way over National forest lands for electric power purposes. Easements are clearly issued pursuant to the 1911 Act. For reasons discussed in the Chapter introducing the description of the existing Federal legal system, it is difficult to determine clearly whether the Forest Service considers the rights-of-way which it issues pursuant to the 1901 Act a "permit" or a "special use permit." Though the Act itself and Department of Agriculture regulations suggest the term "permit," the Forest Service Manual habitually refers to issuance of "special use permits" for uses which, unless the Service is relying upon its general land management authority for such permission, would be authorized only under the 1901 Act. For example, the Manual alludes to issuance of special use permits for allowance of sites for fuel-generated power plants on National forest lands.^{269/} A more predictable use of a "special use permit" by the Forest Service is to authorize prelicense construction on National forest land of hydroelectric project works over which the Federal Power Commission has sole statutory jurisdiction or construction of other electric facilities prior to issuance of easement or permit.^{270/} For the same reasons a special use permit would be the appropriate document for the Forest Service to issue when the Federal Power Commission defers licensing of minor hydroelectric project works to it.^{271/}

1. Eligible Applicants

Under both the 1901 and 1911 Acts, any citizen, association, or corporation of the United States is eligible to seek use of National forest lands for electric power purposes upon furnishing, as appropriate, proof of citizenship or naturalization, a certified copy of articles of association or its equivalent and proof of citizenship of all constituent members, or a copy of charter or articles of private incorporation certified by both officials of the state of incorporation and state where doing business as a foreign corporation.^{272/}

The Forest Service will issue only one transmission line permit to serve a given territory. Where more than one applicant has applied for such, preference is given to the applicant offering maximum service and coverage, other things being equal.^{273/} If equal service and coverage are offered by competing applicants preference is given to public bodies, then to cooperatives.^{274/}

2. Available Lands

Lands administered by the Forest Service to which both the 1901 and 1911 Acts apply include those reserved from the public domain or acquired for National forest purposes as well as Title III lands reserved from the public domain under the Bankhead-Jones Farm Tenant Act of July 22, 1937, 7 U.S.C. § 1101(d). 275/

3. Acreage

The 1901 Act limits the maximum size of a right-of-way for electrical works to the extent of the ground occupied plus fifty feet on each side of its margins. The maximum size of transmission and distribution line rights-of-way is fifty feet on each side of the center line of electrical lines and poles. The 1911 Act limits the maximum width of easement for electric transmissions or distribution purposes authorized pursuant to it to two hundred feet on each side of the center line of the lines or poles. 276/ Within the statutory latitude allowed under either Act, agency policy requires that the dimensions of rights-of-way be kept to the minimum required for the use specified and for the protection of surrounding lands. 277/ It does this both by limiting the number of transmission lines on these lands to those essential, i. e., one line per territory to provide the necessary service and by encouraging the utilization of utility corridors wherever possible. 278/

When a right-of-way of greater width than the maximum allowed by the 1901 or 1911 Acts or a right-of-way for nonprimary power lines is required, the applicant must obtain an annual special use permit under the Act of June 4, 1897. 279/

4. Interest and Tenure

By its terms that 1901 Act creates no interest in land, but a revocable permission to use lands only. Though revocable at any time, the permission given under this Act could last indefinitely but for the fact that Forest Service policy is to fix a limited period of duration on all permits it issues. 280/ In no case will it issue a permit for an electric power permit for a period of more than fifty years. 281/

Under the 1911 Act an easement may be issued for a maximum term of fifty years. 282/ Upon thirty days written notice all or any part of easements issued under the 1911 Act may be forfeited or annulled by the Chief of the Forest Service if the grantee abandons the right-of-way

or fails to use it for two years.283/ Such notice will request surrender of the easement by formal legal relinquishment of the grant or evidence of intent to resume use within a reasonable period.284/ Copies of any formal relinquishment of lands reserved from the public domain are distributed to the Bureau of Land Management.285/ Prior to termination, however, the grantee remains liable for compliance with the terms and obligations imposed under his grant, including those requiring removal of any improvements he has constructed on such site.286/ Surrender of the easement may also, of course, be initiated by the grantee.

Prelicense construction permits for hydroelectric project works terminate on the date upon which a Federal Power Commission license is issued for such works or when the Federal Power Commission denies or a permittee rejects a license.287/

5. Price and Related Terms

Except where free or nominally priced use is justified, it is the general policy of the Forest Service concerning use of National forest lands for electric power sites or rights-of-way to require that the grantee pay for use of the land a fee commensurate with its value where this can reasonably be determined.288/ Fees charged for power transmission line use are the same irrespective of whether an easement or a special use permit is obtained.289/ The minimum annual fee per use is \$2.00 per acre or \$10.00 per mile or fraction thereof, whichever is greater.290/

Rural Electrification Administration sponsored cooperatives with outstanding Rural Electrification Administration loans are granted free use.

The minimum fee for power plant sites, whether permits for thermal plants, prelicense permits for major hydroelectric power plant sites, or special use permits for minor hydroelectric power plant sites is \$100.291/

Fees are paid annually. General adjustments in fees are made at five year intervals, but readjustment can be obtained whenever necessary before that time to make fees for similar uses consistent with each other.292/

6. Restrictions, Conditions, and Obligations

Prerequisite to a grant under either the 1901 or the 1911 Acts of use of National forest reservations is a finding by the chief officer of the

department supervising or controlling it that such grant is not incompatible with the public interest. 293/ Before making such a finding the Chief of the Forest Service considers the effect of the permit or easement on National forest lands and resources. 294/ This is done by means of an impact analysis performed by the Forest Supervisor at the direction of the Regional Forester recommending its grant or denial and specifying any special provisions necessary to protect the public interest. 295/ Because construction of power transmission lines requires a continuous cleared area, precludes normal timber production on such area, increases forest fire potential, and generally leaves scars and disrupts the landscape of the area. 296/ Conditions believed necessary are secured by stipulations of the grantee incorporated in the authorizing instrument. 297/ Standard stipulations have been developed by the Forest Service for power transmission lines. 298/

Use of the permit or easement is restricted to those authorized under it and where such uses are concerned the initial holder's rights are superior. 299/ Subject to such right the United States may use or grant easements or special use permits authorizing others to use such right-of-way for purposes that will not interfere with the right of the original easement holder. Transmission line permits issued require service to be furnished throughout the territory covered by the permit. 300/ The permit will be revoked for failure to comply with this condition. 301/

Real Estate Association cooperatives are exempted from conditions concerning inductive and conductive interference and from the hazard clause. 302/ Special stipulations recommended are cleared with the regional attorney in charge. 303/ Since power lines represent a major impact on National forest lands, Forest Service encourages utilization of all technological advances such as burial of low voltage lines. 304/

No referral to the Department of the Interior is required by the Forest Service or Bureau of Land Management for the right-of-way applications.

Since March 23, 1963 permits or easements for electric transmission lines of 33 kilovolts or more are conditioned upon special wheeling stipulations executed to conform to Department of Agriculture regulations, comparable to those of the Department of the Interior discussed earlier in this Chapter. Form 2700-13 Easement for Transmission Line - 33 Kilovolts or More. 305/ The Department of Agriculture justifies these regulations on the ground that they will produce more

economical electric power transmission and reduce the need number of permanent crossings of National forests represented by parallel lines. 306/

Permits or easements for such power transmission lines must be coordinated with the power marketing office of the Department of the Interior and the Rural Electrification Administration. 307/

The procedure for granting such easements or permits across lands under Forest Service jurisdiction is specified in regulations supplemented by a Memorandum of Understanding between the Secretary of Agriculture and the Secretary of the Interior entered March 5, 1964. 308/

No referral to the Department of the Interior is required by the Forest Service for the right-of-way applications for electric transmission lines of 33 or more kilovolts across lands administered by the National forests in twenty states in which the Department of the Interior has no Federal power marketing program, 309/ though such rights-of-way are subject to the wheeling provisions of the Department of Agriculture regulations and the right to impose them may be reserved. 310/ Applications for such rights-of-way or for requests for permission to construct in advance in all other states are referred by the regional forester to the appropriate power marketing office of the Department of the Interior with a notation whether the applicant has already executed a wheeling contract with that Department for advice whether the right-of-way would conflict with the Federal power marketing program, changes necessary to avoid this, whether the execution of a wheeling stipulation is necessary, and whether surplus capacity could be used by the Department of the Interior under the facility as proposed or changed to increase capacity for such use. Applicants deal directly with the power marketing agency concerning any recommended modifications or wheeling arrangements followed by referral to forest service or Bureau of Land Management field officer for their approval of any changes. Applications plus comments from the Department of the Interior are referred to the Washington office of the power marketing agency for any further remarks, then are forwarded to the Assistant Secretary for Water and Power Development for final determination of the issues on which comments have been solicited. The Assistant Secretary for Water and Power Development transmits power marketing comments to the Secretary of Agriculture.

Applications received by the Bureau of Land Management for transmission rights-of-way of less than 33 kilovolts are forwarded to the appropriate power marketing office only and not to the Assistant Secretary for Water and Power Development. 311/

Special use permits issued for prelicense construction of hydroelectric plants or primary transmission lines under the jurisdiction of the Federal Power Commission are issued only after Federal Power Commission authorization and contain all standard and special Forest Service conditions plus those which the Federal Power Commission requests. 312/

The Forest Service administers provisions obtained by stipulations by first calling violations of them to the attention of the grantee, then, if necessary, requesting the Attorney General to bring an action to compel compliance with such stipulations or to enjoin their violation. 313/ There is no statutory provision for revocation of easement for breach of conditions placed on it. 314/

F. Use and Occupancy of Public Lands for Hydroelectric Power Purposes

1. The Federal Power Act of August 26, 1935
49 Stat. 838, 16 U.S.C. § 791a-793, 795-818, 820-

Part I of the Federal Power Act of August 26, 1935 incorporates the Federal Water Power Act of June 10, 1920 315/ which is intended to provide a complete scheme of National regulation to promote the comprehensive development of the water resources of the Nation, insofar as it is within the reach of the Federal power to do so, and to place in one agency, the Federal Power Commission, authority over the hydroelectric resources owned or controlled by the Federal government. 316/ The Act authorizes use of public lands and reservations for improvement of navigation, for the development of water power, for recreation, and for "other beneficial uses." 317/

Part II of the Federal Power Act is an exercise of the commerce power by which public utilities engaged in the interstate transmission and sale of electric energy are regulated with respect to rates and service. 318/

2. Power Uses Authorized Under The Federal Power Act

The Federal Power Act authorizes the Federal Power Commission to issue licenses for the purpose of constructing, operating, and

maintaining "dams, reservoirs, power houses, transmission lines, or other project works" necessary or convenient 1) for the development and improvement of navigation and 2) for the development, transmission, and utilization of power across, along, from, or in any of the streams or other water bodies over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states or upon any part of the public lands and reservations of the United States, or 3) for the purpose of utilizing the surplus water or water power from any government dam. 319/ While navigable waters or government dams may also be situated on public lands or reservations, this study is concerned only with the spatial uses of public lands or reservations authorized by the Federal Power Act.

A Federal Power Commission license authorizes construction of "project works", i. e., "physical structures of a project, " ("dams, power houses, transmission lines, and other 'project works'"), not "projects, " which encompass a whole development. 320/

The Act defines a "project" to include the:

"complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands or interests in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit;..." 321/

3. Administrative Delegation of Authority Under The Federal Power Act

The Federal Power Commission consists of a chairman who is its executive head, and four other Commissioners, the immediate offices of these five Commissioners, an Executive Director of the Commission, and a technical and administrative staff of two bureaus and numerous offices. 322/

All executive and administrative functions of the Federal Power Commission were, with certain reservations, transferred to the Chairman of the Commission who may authorize their performance by any officer, employee, or administrative unit under his jurisdiction. 323/

In carrying out any of his functions under the provisions of § 792 of the Act, the Chairman is governed by the general policies of the Commission and by the regulations, decisions, findings, and determinations which it is authorized to make. 324/

Pursuant to delegation, the Bureau of Power investigates license applications and make recommendations to the Commission. 325/

The Secretary of the Federal Power Commission executes the Commission's duties required to implement the Federal Power Act. 326/

4. Applicants Eligible To Obtain Licenses Under The Federal Power Act

Under the Federal Power Act the Federal Power Commission is authorized to issue licenses to "citizens of the United States, associations, corporation, state, or municipalities." 327/

A "municipality" includes a city, county, irrigation district, drainage district or other political subdivision or agency of a state competent under state law to carry on the business of developing, transmitting utilizing, or distributing power. 328/

A "corporation" includes joint stock companies, partnerships, associations, business trust, or organized groups of persons regardless of incorporation, in addition to receivers and trustees of any of these entities, but it does not include a municipality. 329/

Whether or not Congress intended to make eligibility for a preliminary permit more liberal than that required to obtain a license, it would appear to have done so. Preliminary permits may be obtained by "any person, association, or corporation." 330/ Inasmuch as the function of a preliminary permit, as will be subsequently discussed, is primarily to maintain a future licensee's priority while he qualifies for a license, such permit might serve that purpose while application for United States citizenship was being made.

When the Commission determines that development of water resources should be made by the United States itself the Commission shall not approve any private application affecting such development, but shall investigate and submit a report to Congress. 331/

5. License Applicants Which Receive Preferences Under The Federal Power Act

Except in instances when the Federal Power Commission has determined that the United States should develop the relevant water resource itself 332/ or where it may waive the requirements of the Act, 333/ or where priorities have been established by the issuance of a preliminary permit, 334/ the applications of states and municipalities for a new license receive a statutory preference. 335/

Among all other applicants, the Commission must select those whose plans are best adapted to the public interest. 336/

6. Lands Available for Federal Power Commission Licensed Hydroelectric Power Project Works

The Federal Power Commission may issue licenses for the development, transmission, and utilization of power across, along, from or in any of the streams or other water bodies over which Congress has jurisdiction, or upon any part of the "public lands" and "reservations" of the United States. 337/

"Public lands" are defined as such lands and interests in land owned by the United States as are subject to private appropriation and disposal under the public land laws, and the Supreme Court has construed this to mean lands "unqualifiedly" subject to sales and disposition and not appropriated to some other purpose. 338/

"Public lands" do not include "reservations" defined in the Act as National forests, tribal lands embraced within Indian reservations, 339/ military reservations, and other lands and interests in lands owned by the United States and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes. 340/

While licenses on lands within "reservations" defined by the Act may be issued if the Federal Power Commission finds that the proposed structure will not interfere with or be inconsistent with the purposes for which the reservation was created or acquired, and subject to conditions imposed by the department head administering them to assure

this, more stringent restrictions are placed on lands in National parks or monuments. In 1921 Congress provided that authority to license project works on such lands (or to issue leases or permits) must first be obtained from it. 341/

In addition to public lands and reservations, projects licensed by the Federal Power Commission may include land owned or purchased by the licensee and lands acquired by the licensee through exercise of the United States' right of eminent domain which the Federal Power Act makes available to him when he cannot otherwise acquire property necessary to a project. 342/

7. Acreage Obtainable Under The Federal Power Act

No limit on the amount of land which may be granted under a Federal Power Commission license is imposed by the Federal Power Act or regulations implementing it.

It is within the discretion of the Commission to determine how much land will be granted initially and whether there may be any subsequent enlargements of the project area. The Commission's discretion in this area, is based solely on the standard of providing for a comprehensive plan for water development and public use. An indication of the liberality with respect to acreage obtainable for such purposes may be seen in the Department of Interior regulations concerning water development projects. These state that it is the policy of the Department of the Interior and of the Department of the Army to acquire as part of a reservoir construction project, adequate interests in land necessary for optimum value for all purposes, including present and future recreation potentials. 343/ Department of the Interior land management practices are generally much more conservative.

8. Interests and Tenure Obtainable Under The Federal Power Act

The Federal Power Act makes express provision only for the issuance of preliminary permits and licenses by the Federal Power Commission. The March 3, 1921 amendment of the Act concerning National parks and monuments refers to prohibition of leases as well. Federal Power Commission regulations only refer to leases of licensed project works by the licensee to others. 344/ The Act also permits the Commission to make lands available to states or their political subdivisions for rights-of-way for public highways and to the Secretary of the Interior for disposition of lands and various interests in lands under the public land laws of the United States.

a. Preliminary Permits. Application for a preliminary permit is referred to the Bureau of Power and General Counsel under the Federal Power Commission study and recommendation.^{345/} It is not necessary to have obtained a preliminary permit from the Commission in order to receive a license from it subsequently. The advantage in doing so, however, is to maintain the permittee's priority among subsequent license applicants for a period not exceeding three years while he secures the necessary data and performs the acts required in order to obtain a license.^{346/} While this protects an entrepreneur willing to invest time and money in determining where and in what form to propose construction of a project, it does not authorize actual construction prior to issuance of a license.^{347/} Once a license is issued under 16 U.S.C. § 797(e), the preliminary permit terminates and the rights thereunder are applicable.

b. Licenses. The Federal Power Act provides for issuance of licenses for various purposes and of various duration. The basic licensing provisions of the Act concern licenses which may be issued for a period not exceeding fifty years.^{348/} If at the end of a license term Congress has not authorized recapture of the project works not determined that the project area should be given over to nonpower uses, ^{349/} the Commission may proceed to issue a new license for the project.

The Act also provides for two licenses of lesser duration. The first of these is the year-to-year license issued annually after expiration of a preexisting license or a determination by the Federal Government to take over a licensed project for public purposes pending issuance of a new license or Federal possession of the project.^{350/} The second is a temporary license for nonpower use of a project area issued pending authorization of a state, municipal, interstate, or Federal agency willing to assume regulatory supervision of it.^{351/}

9. Termination of Licenses Under The Federal Power Act

Licenses issued by the Federal Power Commission may terminate in one of five ways.

- (1) The Commission may accept applications for surrender of a license. Licenses may be surrendered only upon the fulfillment by the licensee of such obligations under the license as the Commission may prescribe. Where the

project works have been constructed on lands of the United States, the licensee is required to restore the lands to a condition satisfactory to the department having supervision over such lands and annual charges continue until such restoration has been satisfactorily completed. 352/

- (2) No earlier than five years before the expiration of any license the Commission must solicit applications for new licenses and institute relicensing proceedings. Notice is given and hearings are held. At such proceedings, under the Commission's rules, any Federal department or agency can recommend that the United States exercise its right to take over any project. 353/ The Commission may solicit recommendations from the Secretaries of the Army, Interior, Agriculture, Health, Education and Welfare, and other appropriate Federal agencies concerning recapture or relicensing the project. The Commission simultaneously requests the licensee's plans for future development and use of the project. After consideration of various documents and oral arguments if any, the Commission forwards its recommendations to Congress as to whether the project should be recaptured by the United States.

If Congress authorizes recapture of the project works, the Federal Power Commission dismisses any pending application for a new license, and gives the licensee notice, and directs him to present his claim for compensation. 354/ Unless a recapture proceeds pursuant to mutual agreement, at least two years' written notice to the licensee is required before the United States can take over the project. Compensation equivalent to the net investment of the licensee, not to exceed the fair market value of the property must be paid. 355/ The amount of such investment and any reasonable damages involved is determined after notice and opportunity for a hearing on the matter. Upon tender of compensation, the licensee must transfer to the United States in such manner as the Commission directs. 356/

If at the end of a license term Congress has not authorized recapture, the Commission may proceed to issue a new license for the project and pending consideration of an application by a licensee for a new license will issue annual licenses to the licensee.

These provisions for recapture of a project are merely alternative to and not in lieu of the right of the United States, or any state, or municipality to take over, maintain, and operate a project license under this chapter at any time by condemnation proceedings. 357/

- (3) If the licensee does not commence the project works or parts of it by the time prescribed by his license, or any extension given by the Commission, the license can be terminated by written notice of the Federal Power Commission. 358/ If a project is begun, but not completed within the prescribed or extended time set by the Federal Power Commission the Attorney General upon request from the Commission may institute proceedings in equity to revoke... a license or permit or to obtain other appropriate equitable relief in Federal district courts. 359/ If a license is revoked, the court may order sale of the works in order to wind up all business matters, and the purchaser at such a judicial sale steps into the shoes of the licensee subject to all of his obligations which the court deems equitable to continue. The United States may purchase at such sale for the same amount it would have paid to recapture the project works under 16 U.S.C. § 807. 360/
- (4) Upon the request of the Secretary of the Army or the Federal Power Commission the Attorney General may seek revocation of a license or a permit for violation of the terms of said license or permit, including nonpayment of annual charges owed. 361/

Compliance with the terms of the license and with the approved plans in construction, operation, and maintenance of the licensed project, and with the terms of preliminary permits, is enforced by periodic inspection by the Division of Power under Federal Power Commission supervision. Apparent violations of such terms or plans, or of provisions of the Act and regulations of the Commission, are reported to the Commission. If satisfactory adjustments are not made, orders to show cause are issued and served upon the permittees or licensees and interested state agencies. After notice, hearings may be held and the matter referred to the Attorney General for institution of court proceedings. 362/

- (5) A license may also be revoked in case of a war emergency upon reimbursement to the licensee of an amount equal to his net investment as provided for recapture of project works by the United States. 363/

10. Price and Related Terms Concerning Licenses Under The Federal Power Act

The holder of a licensee issued under the Federal Power Act must pay the United States reasonable annual charges fixed by the Federal Power Commission to cover the cost of the administration of the Act and to recompensate the government for the use and occupancy of its lands and other property. In setting the price the Commission tries to avoid increasing the price to the consumer of power developed and to allow for the adjustment of charges. 364/ The regulations spell out in detail how annual charges are determined for licenses other than those for state or municipal project works having a capacity of more than 2,000 horse-power, state or municipal licenses for project works of more than 100 horse-power capacity. Reasonable annual charges for other project works are determined by the Commission after consideration of all the facts in each case, such as commercial value, the most profitable use for the land, the beneficial purpose for which the land may be used, and other factors which the Commission may deem pertinent. 365/ The minimum annual charge for the use of government lands under any license shall be \$5.00. 366/ Charges for the use of dams or structures owned by the United States or by Indian tribes fixed by the Commission must be approved by the Secretary of the Interior or by the Indian tribes themselves. 367/ Where a licensee is delinquent in the payment of annual charges a penalty of five percent of the delinquent amount is added and a penalty of three percent for each subsequent month the debt is outstanding is added until all charges or penalties are paid or until the lease is cancelled and the charges are satisfied in accordance with the law. 368/ Except for the proceeds of licenses relating to Indian lands and reservations, which are credited to the Indians of such reservations, funds collected from the issuance of Federal Power Commission licenses are paid into the Federal treasury minus sums necessary to reimburse the United States for the administration of this Act.

11. Pricing Preference for Public Agencies

Charges assessed for licenses for the development, transmission, or distribution of power by states or municipalities are reduced or waived to the extent that project works were: 1) primarily designed to provide

or improve navigation; 2) power is sold directly or indirectly to the public without profit; or 3) power is used by the licensee for state or municipal purposes. 369/ The regulations spell out in great detail the procedure for application for and acceptance of such exemption from annual payments.

Licenses for project works of not more than 2,000 horse-power capacity to supply power for domestic mining or other beneficial use may be issued without charge except when located on Indian reservations. 370/ In no case may a license be issued without charge for the development and utilization of power created by any Federal Government of functions requiring the use of public land, waters which are navigable or which affect interstate commerce, or water or water power deriving from Government dams is therefore of great importance.

12. Rights, Restrictions, and Conditions Pertaining to Licenses Under The Federal Power Act

A licensee under the Federal Power Act has only those powers which are specifically granted in the particular license and such powers are subject to strict construction and to the limitations prescribed by the Act. 371/

Under the Act, after securing a license, he has the power to construct, operate, and maintain dams, reservoirs, powerhouses, transmission lines, or other projects works necessary or convenient for the development and improvement of navigation and for the development and utilization of power. 372/ Reasonable expenditures for public recreational development pursuant to an improved plan including the purchase of land are allowed him as part of the cost of the project. Therefore, the Commission expects the licensee to assume certain responsibilities concerning recreational development and to develop a comprehensive plan for power development and recreational development. 373/ The Act also allows for the licensee to grant permits to other persons for the development of recreation facilities, thus allowing for sublicenses.

When the licensee cannot acquire an unimproved dam site or the right to use or damage the land or property of others necessary to construct, operate, or maintain his project, and the Commission believes it is desirable that he be able to do so, he may acquire the land by the exercise of the right of eminent domain. 374/

If lands are declared open to entry, location, or selection under 16 U.S. C. § 818 a licensee has the right to enter, occupy, and use any part of the open land necessary for the purposes of the Act. Such right shall be expressly reserved in any patents issued.375/

By and large, however, the rights of a licensee under a license granted to him by the Federal Power Commission are not specifically spelled out in the statute. Although the standard conditions forms of 18 C.F.R. § 2.9 (1969) are quite detailed and serve as a reference base, each license rests on its own merits and contains rights and obligations reflective of each unique licensee.

In order to obtain a license from the Federal Power Commission, a licensee applicant must comply with the procedures established for its issuance and agree to comply with additional conditions for the duration of the license period.376/ Congress intended to give the Commission wide latitude and discretion in the performance of its licensing and regulatory functions.377/ Reasonable conditions can be attached to new and previously licensed structures alike when a license is amended.378/ Where Congress fails to provide a formula for the Federal Power Commission to follow, courts are not warranted in rejecting the Commission's formula unless it plainly contravenes the statutory scheme of regulation.379/ Unless the action of the Federal Power Commission is arbitrary or without basis in the record, the court has no power to disturb it.380/

The Federal Power Act itself imposes the following requirements on a licensee of a hydroelectric power project.

All licenses are issued on the condition that the project be adapted to a comprehensive plan for improving and developing water ways and for the improvement and utilization of water power development, and for other beneficial public uses.381/

The licensee must construct, operate, and maintain dams, reservoirs, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power.382/

The licensee is obligated to file a statement showing actual legitimate original cost of the construction of the project works, additions, or betterments and the price paid for water rights, rights-of-way, lands, or interests in lands.383/

The licensee must grant to the Commission or its duly authorized agents at all reasonable times, free access to such project and to all maps, contracts, reports, and all other papers and documents relating thereto. 384/

If the licensee is a public service corporation or anyone developing and distributing power for the use in public service, he must abide by reasonable regulation of his services as prescribed by the state in which he is dealing. 385/

Whenever the licensee is directly benefited by the construction work of another licensee, permittee, or the United States the Commission shall require as a condition of the license that the benefited licensee reimburse the owner of the improvement. 386/

The licensee is liable for damages to the property of others caused by the construction, maintenance, or operation of the project works or works constructed under the license and in no event is the United States liable for such. 387/

Federal Power Commission regulations amplify such requirements. The Commission expects the licensee to assume certain responsibilities: i. e., to acquire in fee and include within the project boundary enough land to assure optimum development of recreational resources; to encourage and cooperate with appropriate local, state, and Federal agencies and other interested entities including private interests in order to fully develop, operate, and maintain recreational areas and facilities in and around the project area. 388/ The licensee of the project shall make reasonable effort to keep the public informed of the availability of project lands and waters for recreational purposes and conditions of interest to persons who may wish to acquire lands in the vicinity. 389/

Every licensee maintaining recreational facilities for the use of the public at a licensed project or employing or permitting any other person to maintain such facilities shall require equal and unobstructed use of such facilities to all members of the public without regard to race, color, religious creed, or national origin. 390/

The Commission has approved several sets of standard conditions for normal inclusion in preliminary permits or licenses for hydroelectric developments. 391/

Any conditions in the preliminary permit do not preclude insertion of additional conditions precedent to or in the license itself. 392/ Some of these standard conditions appear in the statute: e. g., that Federal

Power Commission must approve and may modify project plans or changes in them; that the licensee must maintain the project works in repair in conformance with Federal Power Commission rules and is liable for damages for failure to do so; and that the licensee must pay the Government reasonable annual charges. 393/

Other standard conditions are contained in Federal Power Commission forms, e. g., to permit the Federal Power Commission to inspect projects, to observe land and water conservation measures, and to maintain stream flow. 394/

In a special situation, of course, the Commission in issuing a permit or a license for a project may modify or eliminate any particular condition and add such other conditions which it believes the circumstances require. 395/ Licenses for projects to be located within a "reservation" are issued only after a finding by the Commission that the structure will not interfere or be inconsistent with the purposes for which the reservation was created or acquired and subject to such conditions as the Secretary of the department administering the reservation deems necessary.

13. Electric Power Functions Outside the Jurisdiction of the Federal Power Commission

The power to issue licenses for hydroelectric project works on public lands and reservations resides exclusively in the Federal Power Commission under the Federal Power Act.

However, despite an opinion to the contrary issued by the Chief Counsel of the Federal Power Commission in 1927, the Commission has no authority to license transmission lines crossing public lands which are not part of a hydroelectric project. 396/ Jurisdiction to issue rights-of-way over such lands lies either with the Secretary of Interior or the Secretary of the Department of Agriculture under the 1901 Act, or with the head of the department controlling them under the 1911 Act; discussed earlier in this chapter.

Further, the Federal Power Commission has determined that its licensing authority for transmission lines extends only to "primary" transmission lines, i. e., lines transmitting power from the power house or appurtenant works of a project to the point of junction with the distribution system or with the interconnected primary transmission system. 397/ Applications for licenses for nonprimary transmission

lines are directed to the Federal department having supervisory jurisdiction of the land or waterway on or over which the nonprimary transmission line will be located. 398/ Distribution lines may still be authorized by the Department of Agriculture or the Department of the Interior. 399/

Federal Power Commission jurisdiction is further limited to hydroelectric power generating facilities; electric power facilities using steam or other nonhydraulic means of producing energy may be authorized by the Department of Agriculture or the Department of the Interior. 400/

Finally, the Federal Power Commission obtains no jurisdiction over hydroelectric project works for which rights-of-way were issued before June 10, 1920.

Before enactment of the Federal Water Power Act on June 10, 1920, the authority to issue licenses for public utility facilities on the United States lands rested with the Secretaries of (then) War, the Interior, and Agriculture. 401/ Under the River and Harbor Act of 1899, permission of the Secretary of War was required in addition to any applicable permit issued by the other Secretaries in order to occupy and obstruct navigable waters. 402/ The Act of February 15, 1901, 31 Stat. 370, 43 U.S.C. § 959, 16 U.S.C. §§ 79, 522, authorized the Secretary of the Interior and the Secretary of Agriculture to grant rights-of-way over public lands, forests, and reservations of the United States for purposes of "electrical plants" and "poles and lines for generation and distribution of electric power." The Act of February 1, 1905, 33 Stat. 628, 16 U.S.C. § 524, amended this Act by transferring authority to grant rights-of-way for such purposes over National forest lands from the Secretary of the Interior to the Secretary of Agriculture. 403/ The Act of March 4, 1911, 36 Stat. 1253 as amended, 43 U.S.C. § 961, 16 U.S.C. §§ 5, 420, 523, authorized the head of any Federal department to grant rights-of-way over public lands and reservations which he supervised for "electrical poles and lines for transmission and distribution of electric power."

The Federal Water Power Act provided for repeal of all or any part of statutes inconsistent with it. 404/ Legal opinions rendered by the Department of Justice and the Department of the Interior held that the Federal Water Power Act terminated the jurisdiction of any other Federal agency pursuant to the 1901 or 1911 Acts just discussed to license electric power facilities which the Federal Water Power Act placed within the licensing jurisdiction of the Federal Power Commission. 405/

So long as there is no change in facilities authorized prior to 1920, or rights concerning them or their ownership, the Federal Water Power Act does not effect permits issued for them by the Secretaries of Agriculture or Interior, except to authorize the holders of such rights-of-way or permits to surrender them prior to their expiration date and apply for a license from the Federal Power Commission for the use involved.^{406/} The advantage in doing so is that the license issued to persons surrendering rights-of-way or permits issued prior to 1920 receive more favorable terms of compensation should the Government subsequently exercise its right to take over the project for public purposes pursuant to 16 U.S.C. § 816. They may receive the "fair value" of their project determined at the date of license issuance rather than its original cost less depreciation, the measure of compensation provided for other licenses.^{407/} Otherwise, the permit or right-of-way holder may retain his rights until they expire, at which time the United States may take over the project without payment.^{408/}

14. Electric Power Functions Delegated by the Federal Power Commission

The Federal Power Commission (FPC) is responsible for processing applications and for issuing licenses for "minor projects" in the same manner as for "major projects."^{409/} A minor project is defined as one having less than 2,000 horsepower of installed capacity; a "major project" has over 2,000 horsepower installed capacity.^{410/} The Federal Power Commission as a general rule does issue licenses for minor projects. In doing so, it may waive the conditions, provisions, and requirements of the Act as it deems in the best public interest except for the license period of fifty years or the charges for the use of lands within Indian reservations.^{411/}

The Federal Power Commission may waive the provisions of the Federal Water Power Act for minor projects altogether by arranging for issuance of special use permits by the Forest Service in lieu of licenses.^{412/}

The Federal Power Commission has made such arrangements in the case of minor projects to be located on lands administered by the Forest Service pursuant to an informal agreement between the two agencies entered in September 1952. By the terms of this agreement, the Forest Service is authorized to receive applications for and to issue special use permits for minor water-power projects. In these cases the project can be authorized by either terminable or term special use permits, subject to the Federal Power Commission's

authority to license the project if it so requires. 413/ The FPC may request that as a condition to receive special use permits, the permittees agree to later apply to the Federal Power Commission for a license. 414/

No comparable agreement has been made between the Federal Power Commission and any other Federal agency or department which administers public lands.

When the Federal Power Commission issues any licenses, it may delegate administration of them to the agency controlling the lands on which they are located.

Because Forest Service practices in this situation are so well documented and information illustrating other land administering practices in comparable circumstances is not readily available so far as we know, only interagency coordination between the Forest Service and the Federal Power Commission in making recommendations concerning and administering hydroelectric power projects and primary transmission lines is discussed in this report.

The Federal Power Commission is authorized under the Federal Power Act to withdraw National forest lands for power purposes upon receipt of an application for projects and has authority to grant licenses for hydroelectric projects. 415/ The Federal Power Commission determines under § 23b of the Federal Power Act whether a license is necessary concerning projects on National forest lands. The Commission also determines whether a line is primary or non-primary in relation to the transmission of electrical energy. 416/ The Commission's responsibility for licensing power projects in no way, however, relieves the Forest Service of the responsibility of its department as "land manager." 417/

Upon receiving an application for a license or a preliminary permit affecting lands administered by the Forest Service, the Federal Power Commission through the Secretary of Agriculture furnishes copies of such applications and notifies other agencies and invites their comments. 418/ Any Forest Service investigation of licenses is at the invitation of the Federal Power Commission to advise it whether a license will be inconsistent or will interfere with the purposes for which the National forest was created. The Federal Power Commission also asks the Secretary of Agriculture to recommend any conditions deemed necessary for adequate protection and utilization of the forest which should be inserted in any license issued. 419/ The Forest

Service investigates and prepares necessary reports to the Federal Power Commission concerning: (1) fire prevention and protection; (2) soil protection; (3) pollution control; (4) prevention of damage; and (5) avoidance of interference with Forest Service administration and management. 420/ The comments of other Federal or state agencies which may be affected by the application such as the Fish and Wildlife Service, the National Park Service, the Geological Survey, or the State Engineer are also received. 421/ Pursuant to the Fish and Wildlife Coordination Act, there is a mandatory consultation with such agencies as the Fish and Wildlife Service. 422/ Consultation with other agencies such as the Atomic Energy Commission is merely voluntary. The Federal Power Commission is well aware of aesthetic, fish, wildlife, and conservation aspects of licensing. 423/

The Forest Service recommends to the Federal Power Commission certain terms and conditions which it feels ought to be included in a permit or a license, e. g., a stipulation that the permittee shall consult with the Forest Service, and that he obtain a special use permit from it if he intends to use lands on National forests, but outside his project boundary (for instance, for roads, camps, or the like).

The Federal Power Commission has primary responsibility for the supervision of construction, operation, and maintenance of the project it licenses. The Commission notifies the Forest Service when it intends to assign such supervision to the Forest Service. 424/ In such instances, the regional forester will supervise and inspect the work to insure compliance with the terms and conditions of the license. 425/

Forest Service responsibilities in the administration of power licenses for minor projects also includes taking appropriate action in the event of expiration, abandonment, or transfers of ownership. 426/

15. Nonpower Uses Jurisdiction Authorized Under the Federal Power Act

In addition to its principal jurisdiction over hydroelectric water power development which has been emphasized in this discussion, the Federal Power Commission enjoys some authority to allow use of public lands for nonpower purposes. Specifically, whenever it determines that all or part of any licensed hydroelectric project works should no longer be used or is no longer adapted for power purposes, it may license all or part of them for "nonpower" use. 427/ Neither the Act nor the regulations define "nonpower use" nor impose any restrictions or qualifications from which the perimeters of this term might be implied. 428/

Additionally, pursuant to Section 24 of the Federal Water Power Act whenever the Federal Power Commission determines that lands which it has reserved as power sites or lands reserved for inclusion in a proposed power project pursuant to application for a license will not be injured or destroyed for purposes of power development by location, entry, or selection under the public land laws, it may authorize the Secretary of the Interior to declare such lands open to location, entry, or selection for such purposes as the Commission determines, subject to the right of the United States, permittees, and licensees to enter, occupy, and use any part or all of the land necessary for the purposes of the Federal Power Act. 429/

Lands which have been reserved or withdrawn for purposes of power development and are subject to restoration pursuant to this provision include: 430/

- (1) lands withdrawn for powersite reserves under the Pickett Act of June 25, 1910; 431/
- (2) lands classified for powersite purposes under the Act of March 3, 1879; 432/
- (3) lands designated as valuable for power purposes under the Acts of June 9, 1916 433/ and February 26, 1919; 434/
- (4) lands described in applications for Federal Power Commission licenses;
- (5) lands within hydroelectric power site permits issued under the Act of February 15, 1901; 435/ and
- (6) lands within transmission line permits or easements under the Acts of February 15, 1901 436/ and March 4, 1911. 437/

In 1966 the Department of the Interior (represented by the Bureau of Land Management and the Geological Survey) and the Federal Power Commission set forth in a Memorandum of Understanding procedures for applications involving such lands. 438/

While the Federal Power Commission has jurisdiction over the power values of such lands, the Geological Survey has jurisdiction under

43 U.S.C. § 31, to classify public lands for power and certain other purposes and the Bureau of Land Management has jurisdiction to manage and dispose of the nonpower surface and subsurface resources of such lands.

Pursuant to this agreement, Bureau of Land Management renders initial determinations concerning applications for disposal or other use of lands sought to be restored from a powersite reservation 439/ (including applications under the Recreation and Public Purposes Act, 440 and other public land laws applications for mineral leases, licenses, or permits, and applications for all rights of way and other requests). If, in Bureau of Land Management's opinion, the application is not inconsistent with proper land use, Bureau of Land Management routes it to the Geological Survey for its recommendation concerning allowance of the application and any special stipulations necessary to protect power values of such lands. The Geological Survey forwards the application to the Federal Power Commission for its recommendations as to restoration of the lands and any restrictions which should be incorporated in the instrument of conveyance. No preference rights accrue to the party who first petitioned for restoration when and if such lands are restored. 441/

Bureau of Land Management plans for construction of facilities on powersite lands are subject to the same procedure.

If the Geological Survey requests Bureau of Land Management to initiate revocation of a powersite reservation, Bureau of Land Management must first obtain Federal Power Commission recommendations concerning such action.

The Bureau of Land Management need not consult the Federal Power Commission, however, concerning grazing or other nonmineral licenses; or leases or permits or contracts for five years or less for disposal of timber, minerals or other materials on power site lands not within a power project; or restoration of transmission lines powersite reservations.

Federal Power Commission consent to the establishment of grazing districts and issuance of grazing permits and leases pursuant to the Taylor Act of 1934 as amended on lands then or later reserved for power purposes but not within a power project area is given on the condition that notice describing the lands involved be given within thirty days and that Federal Power Commission jurisdiction to issue permits and licenses or to permit other location, entry, or selection

of such land under the Federal Water Power Act is not affected. The issuance of such permits or licenses or determination to permit entry automatically terminates grazing district permits or leases over lands described in the Federal Power Commission license or permit.

G. Statutes of Broad Applicability

In addition to Federal statutes which provide exclusively or primarily for development or distribution of electric power on public lands, provisions in statutes applicable to many uses which were discussed in chapter three of this study appear capable of authorizing disposal and/or use or occupancy of lands for electric power purposes although generally no specific reference concerning such use is contained in them. Actually utilized for granting permission for use and occupancy of lands administered by the Forest Service for electric power purposes is the Act of March 4, 1915, 442/ permitting use and occupancy for "structures or facilities necessary or desirable for . . . public convenience, for buildings, structures and facilities for industrial or commercial purposes, and for buildings, structures, or facilities necessary or desirable for . . . any public use in connection with any public activity."

There is one express provision for disposal of public lands or interests therein for electric power purposes which provides for disposal of electric transmission lines determined to be surplus property according to the procedures applicable to the Federal Property and Administrative Services Act of 1949. 443/

Judging from the statutory language employed and applicable agency regulations, public lands might be classified for disposal, lease or permit under many other Acts, though in practice a particular Act may be unsuitable for such use because of acreage or other limitations concerning it contained in the Act itself or its implementing regulations. More specifically, the Small Tract Act, 444/ the Recreation and Public Purposes Act, 445/ the Public Land Sale Act of 1964, 446/ and the Bankhead-Jones Act, 447/ all provide for disposal or use or occupancy of public land for "community" or "public purposes," without further defining such terms.

In addition, the Small Tract Act and the Public Land Sale Act of 1964 expressly provide for respectively lease or sale and sale of public lands for "residential" purposes and the general, 448/ reclamation, 449/ and forest 450/ townsite laws are designed to authorize sale of public lands for such purposes. None of these acts defines "residential," but

the regulations implementing the Multiple Use and Classification Act of 1964 451/ which is applicable to these statutes when administered by the Bureau of Land Management defines residential to include "single or multifamily dwellings or combinations thereof, and related community facilities, both seasonal and year-round." 452/

The Small Tract Act and the Public Land Sale Act of 1964 also provide respectively for lease or sale and sale of public lands for "business" or "industrial" use. The Small Tract Act does not define business nor does the Public Land Sale Act define "industrial." However, the regulations implementing the Multiple Use and Classification Act of 1964 which apply to these and other Acts defines "industrial" as the "manufacture, processing, and testing of goods and materials, including the production of power," and defines "commercial" as the "sale, exchange, or distribution of goods and services." 453/

Finally several acts authorizing disposal of public lands make no express reference to purposes for which lands may be sold nor place any express restrictions on such purposes. These include the Isolated Tract Act, 454/ the reclamation land sale provisions 455/ and some general surplus property provisions 456/ of the Federal Property and Administrative Services Act of 1949.

III. DISPOSAL, USE, AND OCCUPANCY OF PUBLIC LANDS FOR COMMUNICATIONS PURPOSES

This section discusses provisions for use and occupancy of lands for telephone and telegraph lines and facilities and sites for radio and television and other similar electronic uses. Since there are no special provisions expressly providing for disposal of these kinds of sites, this discussion is limited to rights of use and occupancy for these purposes.

There are no statutes limited solely to use and occupancy provisions for communication uses. The applicable statutes authorize communication uses along with other kinds of uses, generally rights-of-way for various purposes. The basic authorities for use of Section 10 lands for communication uses are two statutes discussed earlier in this chapter in connection with electric power uses, the Acts of 1901 and 1911. Because their general provisions are discussed fully there, they will be given abbreviated treatment here. In this section emphasis will be placed on judicial and administrative interpretation of these statutes when communications use of public lands is sought under them.

The 1901 Act 457/ authorizes the Secretary of the Interior to issue regulations to permit the use of rights-of-way through the public lands, forest, and other reservations of the United States and certain named national parks for poles and lines for telephone and telegraph purposes by any citizen, association, or corporation of the United States. The right can be granted within a national park or reservation only when it is found to be not incompatible with the public interest by the chief officer of the department supervising such park or reservation lands. Such rights have been called a revocable permit 458/ and a mere license. 459/

The 1901 Act gives identical power to the Secretary of Agriculture 460/ to permit use of the national forests for such purposes upon approval of the chief officer supervising them and after a finding by him that such use is compatible with the public interest.

Like the 1901 Act, the 1911 Act provides authority for "poles and lines for communication purposes." It differs from that Act, however, in that it authorizes a 50-year term, it also provides for "radio, television, and other forms of communication, transmitting, relay, and receiving structures and facilities." As with the 1901 Act, citizens, associations or corporations of the United States are eligible applicants. The right-of-way may be forfeited for nonuse for two years or for abandonment.

For easier discussion, the description of use of public lands for communications purposes is divided into three parts: electronic sites, antenna systems, and telephone and telegraph lines and poles. All three uses may be authorized under the 1911 Act by the head of any department with jurisdiction over the lands sought for such use. Under the 1901 Act permission for location of telephone and telegraph lines and poles may be granted only by the Secretary of Agriculture for forest service lands and only by the Secretary of Interior for all other lands. The authority of these Secretaries has been delegated to the Bureau of Land Management and the Chief of the Forest Service respectively.

The most comprehensive guidelines concerning use of public lands for these purposes are those contained in the Forest Service Manual and the Forest Service Handbook which are applicable when lands within national forests are sought for use. Little intra-agency material of the Bureau of Land Management further amplifies in regard to communications use the general Department of the Interior regulations and policies concerning rights-of-ways set forth earlier in this study. Both agencies require evidence of compliance with the Federal Communications Act of 1934 and regulations promulgated pursuant to it where they are applicable as discussed later in this section.

A. Electronic Sites on National Forest Lands

Electronic sites are generally high points of land suitable for operating radio or television transmitting and receiving equipment.^{461/} They are for the operation of equipment which transmits and receives radio signals, excluding television aerials and antennas for local pickup of programming and passive reflecters.^{462/}

Much communication transmission takes place over microwaves systems which utilize towers from thirty to two hundred feet in height.^{463/} In 1967 there were approximately 6,500 such towers mostly located in rural areas.^{464/} Such systems are used not only by communication common carriers but also by corporations to maintain their own communications systems and by broadcast stations to link their studios to their transmitters.^{465/}

The sites required for "earth stations" in conjunction with the Communications Satellite Act of 1962 ^{466/} might also be considered to be electronic sites. These are to be selected, to the extent practicable, in areas where the surrounding terrain and existing frequency uses are such as to minimize the possibility of harmful interference."^{467/}

The Forest Service identifies appropriate electronic sites on the basis of such factors as location, elevation, access, utility, or ground conformation and consistency with Forest Service multiple use policies and resource plans.^{468/} Typically if sites have been designated by the Forest Service for electronic sites, a site plan will have been prepared showing access roads, powerlines and telephone lines, parking areas, building construction, and placement of improvements. If not, such a plan will be prepared.^{469/}

While a forest supervisor may issue a special use permit for an electronic site after the regional forester has approved the site plan, only a regional forest may issue an easement for such site.^{470/} A separate authorization is required for an electronic site even where it is secondary to an already authorized principal use.^{471/} Easements are issued infrequently, such as in cases of large investment, and then only under circumstances which make a fixed set of conditions appropriate and where the area required is no larger than permitted under the 1911 Act.^{472/} For example, easements may be granted for microwave sites and large radio and television broadcast stations. Similarly while the 1911 Act authorizes execution of an easement for up to fifty years, it is Forest Service policy to grant easements for only twenty-five years with a right of renewal for a like period.^{473/}

The issuance of either instrument is subject to numerous conditions imposed for the purpose of maximizing compatible electronic uses and to harmonize them with other National Forest uses.^{474/} These include requirements to complete construction within a time specified in the grant,^{475/} to obtain permission to make any substantial alteration in the design, location, construction or investment in the project or broadcast capability,^{476/} to maintain all improvements well and see that equipment meets safety requirements, to preserve scenic and aesthetic values insofar as possible,^{477/} to maintain for forest service inspection books and records reflecting the grantee's investment in the project, and to comply with all federal, state, and local laws.

Fire prevention and suppression practices are particularly important conditions. A grantee must agree to make his employees available for fire fighting, including a fixed percentage of personnel to fight fires outside the area of his grant in the event of serious emergencies until the Forest Service can obtain other personnel adequate to control a fire. Payment is made for personnel and equipment used in this case. However, the grantee is required to bear the cost of fighting fires caused by his activity.^{478/} The grantee also must protect land and

property of the United States from damage and pay for any damage done in exercising the grant, including payment to the United States for timber cut unless it is sold by the Forest Service. He must indemnify the United States against liability for damage to life or property resulting from use of the grant.

The grantee must operate the project continuously except where excused from doing so because of unavoidable accident, contingency, or FCC order. He must operate each radio-electronic installation in conformity with FCC license requirements, and avoid or correct any interference with Forest Service radio-electronic operations. 479/

Preservation of the rights of other parties, federal and nonfederal, to use the permittee's site and improvements is a common condition of a permit or easement issued by the Forest Service where such use will not interfere with the grantee's operations. 480/ In such case he may charge reasonable compensation for the use made. Rights-of-way over such grants are also reserved without compensation for forest service personnel and users of the forest.

In areas where radar or microwave radiation may be hazardous, the Forest Service may require a grantee to post the lands as a hazard and fence it in areas of public access. 481/

Occasionally exclusive permits are issued for valid reasons such as interference with the permittee's operations. 482/ A permittee may request the FCC to confirm the need for exclusive use. 483/ Exclusive permits are also issued for security measures suggested by the Department of Defense. 484/

Uses under a permit or an easement are limited to the authorized purpose. 485/ However, rights may be transferred or assigned with the approval of the FCC if the transferee accepts all obligations as well.

If essential project property is removed or abandoned or discontinued for more than two years, or the grantee does not comply with terms and conditions of use the right is surrendered. Thereupon structures and facilities must be removed within one year or they become the property of the United States.

Fees for electronic sites vary depending on the nature of the user. Free use is available: 1) to a governmental agency; 2) for a use of a public or semi-public nature; 3) for noncommercial purposes; 4) for use in connection with an authorized utilization of national forest

resources, and; 5) for a use of benefit to the Government in administering the national forest. Otherwise fees are scaled from high fees where permittees own buildings and equipment on the site to low fees charged amateur radio operators using national forest land.486/ In the former case the fee is .2 per cent of the total value of property owned, not less than \$100, plus 5 per cent of rent and service charges collected from building tenants, and in no case less than \$25. The value of improvements is its cost of materials and construction; the value of equipment its purchase price. In the latter case a minimum fee of not less than \$10 is assessed. Fees are paid annually in advance and are readjusted at five-year periods.487/

B. Antenna Systems on National Forest Lands

National forest lands may also be used for community, association, or individual antenna systems whether nonprofit or commercial to facilitate local pickup of programs. Use of lands for cable rights-of-way necessary for this purpose is also authorized.488/

Antenna systems are available by permit. If used in conjunction with other permitted uses they are included in the basic permit.489/ Ordinarily a Forest Service tower at lookout points cannot be used for antennas.490/

Clearing for antennas and cables is to be held to a minimum.491/

Fees for individual antenna systems are \$4 per antenna per year plus \$1 per mile for cables. If the system is a cooperative one, the minimum fee is \$25 per year.492/ The fee for an antenna system for commercial use is 5 per cent of sales or \$50, whichever is greater, plus \$10 per mile for cables.493/

C. Telephone and Telegraph Poles and Lines on National Forests

Pursuant to the 1911 Act easements may be issued to permit telephone and telegraph poles and lines on national forests. 494/ Authority to issue permits for this purpose is created under the 1901 Act, but the Forest Service appears to rely upon its general authority 495/ to regulate lands for such instruments. 496/

199/

In either case the authorization confers no rights to use the land for any other purpose unless it is specifically provided for.^{497/} In both cases the area allowed is limited to the minimum needed,^{498/} and wherever possible telephone cable is laid within road rights-of-way.^{499/}

As with other communications uses, the right to place telegraph or telephone poles and lines on forest lands is conditioned to protect the public interest in such lands,^{500/} among them the following.

Telephone and telegraph line easement grantees must protect other lines according to usual standards of construction, operation and maintenance and not menace life or property.^{501/} They must also agree to indemnify the United States against any liability resulting from occupancy or use of lands and to repair all damage other than ordinary wear and tear to roads and trails. United States property used must be protected from damage and the grantee must agree to pay the United States for damage resulting from negligence or violating terms of the grant or other laws and regulations. The United States must be paid for all timber cut in construction and maintenance of lines and disposal of all debris resulting must be disposed of; however payment is not required if the Forest Service sells the timber to others. Fire prevention and suppression practices are required. Rights-of-way across the land covered by the grant must be afforded to forest officers and users of the land and purchasers of forest products. Scenic and aesthetic values must be preserved so far as possible. Lines must be operated continuously unless the requirement is waived. Structures and facilities used must ordinarily be removed within one year of the termination, abandonment or forfeiture of the grant or they become the property of the United States. Assignment or transfer of the right-of-way is permitted if the transferee complies with all obligations of the grantee. Compliance with all federal and state and local laws is required.

Fees are paid annually in advance for telephone and telegraph line easements and are readjusted as necessary, and regularly at five-year intervals.^{502/}

The minimum fee for commercial lines is \$1 per acre or \$5 per mile per year. Fees may be higher if there is a loss in timber production capabilities or other resource values of \$1 per acre or more or if prevailing rates for rights-of-way over private lands are higher.^{503/} Fees are less for lines on trees or poles that serve rural or resort areas and are operated only part of the year or have few subscribers, as are fees for noncommercial and nonprofit telephone lines and lines of benefit to the government.^{504/} Some REA cooperatives may under certain circumstances be issued free easements.

D. The Relationship of Federal Communication Commission Policies to Use of Public Lands for Communications Purposes

The land use policies and practices of the Bureau of Land Management and the Forest Service are not derived in a vacuum. Consistence with other state and federal programs is one of the guidelines for classification for retention or disposal of lands administered by Bureau of Land Management 505/ pursuant to Department of Interior regulations implementing the Multiple Use and Classification Act of 1964. 506/

Insofar as public lands may be needed or sought for communications uses, the programs and policies established by the Federal Communications Act of 1934 as amended become pertinent in several respects.

Congress intended the Communications Act of 1934 507/ to establish an expert agency capable of coping with continuously changing and increasing problems of a vital industry by subjecting to competitive licensing procedure and regulatory supervision those engaging in interstate and foreign communication. 508/ That agency is the Federal Communications Commission. It is expected to serve as the single Government agency with unified jurisdiction and regulatory authority over all forms of electrical communication, whether by telephone, telegraph, cable, or radio, 509/ and all "instrumentalities, facilities, and services" incidental to such transmission. 510/

The Act subjects "common carriers," i.e., "persons engaged as a common carrier(s) for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy" but not, however, persons "engaged in radio broadcasting," 511/ to numerous obligations, some of which directly pertain to lands used for communications purposes, and others of which have potential indirect bearing on the demands for or uses of such lands.

Provisions which bear most directly on land uses are the federal statutory requirements that any license for a new radio station issued by the FCC must be preceded by a permit for the station's construction. 512/ The application for a permit will include, inter alia, the proposed location of the station. 513/

In conjunction with the Departments of Agriculture and Interior, and the Director of Telecommunications Management, the FCC has devised regulations governing application for authority to construct a new broadcast station or to modify an existing broadcast station, involving the use of federal lands. 514/ While these do not apply to Government stations, similar coordinating instructions have been issued by the Intergovernmental Radio Advisory Council, and government agencies wishing to use Forest Service or Bureau of Land Management lands must coordinate and secure a site availability statement before occupancy can begin.

An amateur station is a station used by "a person interested in radio technique solely with a personal aim and without pecuniary interest, holding a valid license issued by the Federal Communications Commission authorizing him to operate licensed amateur stations."515/

Mobile stations are stations "in a service of radio communication between mobile and land stations or between mobile stations intended to be used while in motion or during halts at unspecified points."516/

Apparently the regulations were enacted in response to problems of "electromagnetic compatibility" or "proximity interference".517/ They require coordination between the Department of Agriculture and the Department of Interior in the use of lands under their jurisdiction for transmitting facilities. This is necessary because in many areas of the country, most of the "favorable sites" for transmitters and antennas are on hills and mountaintops on lands under the control of the Bureau of Land Management or the Forest Service.518/

An applicant for such construction permits must certify that he has filed a proper application for a land use permit with the land agency involved, and that the land agency has notified him that the site was available, "subject to the Federal Communication Commission's determination concerning electro-magnetic compatibility." The certification of notification of site availability must include the date of the land agency notice and must identify the particular land office from which the notice was sent.519/ Applications for public broadcasting facilities may be submitted to the FCC, and may be considered, prior to the applicant's receipt of land agency notification that the proposed site is available but "final consideration" of the application will be withheld until the FCC receives the applicant's certification of receipt of such notification. All other applications for any other type of facilities cannot be submitted without such certification.520/

The lengthy FCC application form 521/ for such radio construction permit elicits detailed information concerning the location and operation of the proposed station.

Installation and site description include the nature of the installation; the locations of the station, transmitter, main studio, and remote control point; 522/ overall height and feet above mean sea level; a map of the transmitter site; and, aerial photographs of the site. Exhibits indicating possible interference patterns and problems are requested. 523/

Applicants for stations involved in a service of radio communication between specified fixed points within the geographical United States and applicants wishing to conduct international radio communications services from a fixed station applying to the FCC (or IRAC) for construction permits or licenses must simultaneously notify the Director of the National Radio Astronomy Observatory of "technical particulars of the proposed station". 524/

The description of the antenna system to be employed is of particular importance, not only for purposes of identifying interference problems, but for purposes of air safety. The FCC must know the type of antenna, 525/ its overall height and feet above ground (with and without obstruction lighting) and nearest airway within five miles and a list of all landing areas within ten miles. 526/ The operating bureau or office to which the application is submitted notifies the Antenna Survey Branch of the FCC which determines whether the applicant must submit a "notice of proposed construction or alteration" 527/ to the FAA 528/ for its approval or disapproval of the proposed antenna. If notice to the FAA is not required, the ASB provides the original bureau or office with appropriate antenna specifications. 529/ Specific FAA approval is not required if the proposed antenna is to be located in an "antenna farm area" 530/ already "designated" by the FCC for radio and television broadcast facilities and approved by the FAA. 531/ These are areas "designated" for "particular" communities, in which erection of antenna structures over 1,000 feet in height are not deemed to constitute a menace to air navigation. 532/

Following notification to the applicant of the proposed site's availability, the "appropriate Government agency" will notify the FCC of the existing users of or applicants for the site. 533/

The applicant must notify such existing users of his pending application for use of the site, 534/ who are invited to submit "comments" on or "objections" to the applicant's proposed use to the FCC. 535/ These must include relevant technical data" and an engineering "analysis" substantiating any claimed "proximity interference" or "electromagnetic compatibility problems", together with suggested measures which might minimize the problems. 536/ If no objections to the applicant's proposed use are received, the application will be processed "in the normal manner". 537/ As to each objection furnished to the FCC, the applicant must submit to the FCC with a copy to the land administering agency 538/ an engineering analysis together with a description of the measures he is prepared to take to meet the

objection. 539/ The FCC "through appropriate procedures" then determines their validity. Although the responsibility for correcting interference problems is on the applicant, the existing users affected will be expected to cooperate reasonably in reaching a solution. 540/

The FCC then issues either a construction permit or a temporary authorization to test the feasibility of the proposed operation. 541/ The Bureau of Land Management then issues either a right-of-way permit, or if FCC (or IRAC) authorization is limited to a testing period, a temporary right-of-way permit pending issuance of a communications license. 542/ In either case the instrument contains the type, number, and dimensions of the permitted structure and facilities, and any special stipulations required by the Bureau of Land Management as conditions of the grant of a right-of-way, and will preclude the grantee from permitting others to utilize the right-of-way without first obtaining independent authorization to do so. 543/

Other provisions of the Federal Communications Act are less directly relevant to the use of public lands for communications purposes, but do suggest ways in which FCC requirements might bear on this. 544/

The FCC may require carriers to provide themselves "adequate facilities" or to extend their lines or to establish public offices, if it determines such action is "reasonably required in the interest of public convenience and necessity" and that the expense involved will not impair the carriers ability to perform its services. 545/ Further in the "practices . . . facilities, or services" carriers may not unjustly or unreasonably discriminate against nor "give any undue or unreasonable preference or advantage" to, "any particular . . . locality." 546/

The FCC monitors the expenditures and financial position of carriers, including its land costs. It may require a carrier to disclose the cost of property it owns or uses. 547/ Separately, the carrier may be required to report "the reasonable necessary expense lawfully incurred in obtaining . . . any easements, license, or franchise granted by the United States . . .". 548/ All or any part of the property "owned or used" by any carrier may be valued by the FCC as necessary for its regulation of the carriers. 549/

FCC licensing criteria require that issuance of a license be in the "public interest." 550/ Whether the FCC might use such criteria to regulate indirectly the use of public lands for communications purposes has not been explored.

The cases interpreting the "public interest" 551/ standard are similar to the "public convenience and necessity" standard used with regard to common carriers supra. 552/ In the most recent case interpreting "public interest" the respondent cable company unsuccessfully argued that the FCC had exceeded its authority by attempting to regulate community antenna TV. In attempting to delineate limits on the FCC's authority, the court declared:

"The authority which we recognize today under § 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. The Commission may, for these purposes issue "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law" as "public convenience, interests, or necessity requires." 553/

Nor is it clear whether land administering agencies might be considered to be "parties in interest" who could contest at any hearing the granting or renewal or revocation of a license or the granting of a construction permit on the ground that such action would not serve the public interest. 554/

Among reasons for which the FCC may revoke any station license or construction permit are "conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application." 555/ Revocation may also be imposed for "willful or repeated violation" of either any section of the Communications Act of 1934 or any order of the FCC. 556/ There are no FCC decisions or court cases indicating that this section has ever been used to revoke authorizations pursuant to land related abuses.

It would seem that some possible relationship could be constructed between the paramount interest in better and more effective service and the use by common carriers (and, for that matter, broadcasters) of federal public lands. How the users, i.e. broadcasters and common carriers, use public lands will determine, inter alia, the quantity of such users able to use that public land. Assuming a limited amount of public land is available for such use, either because of the limited amount of public land in general, or the limited amount of public land which be suitable for such use, then it seems that the prospect of an overall reduction or a decreasing rate of expansion of broadcasting services might be foreseeable. This factor might be justifiably used by the FCC in attaching terms and conditions to certificates. -

An example of the type of interagency cooperation which might be used to effectuate policies of both agencies may be seen in the plan for the coordinated park and communications use of federal public lands developed after a conference held by Bureau of Land Management and the Maricopa, Arizona, County Board of Supervisors. A study group was formed including the local county Government, the United States Bureaus of Land Management and Reclamation, representatives of communications common carriers, private broadcasters, and public utilities, but somewhat remarkably, not the FCC.557/

The plan formulated by study group and "adopted" by the Bureau of Land Management and the Maricopa County Board of Supervisors concerned federal public lands leased by the county under the Recreation and Public Purposes Act 558/ whereby six mountain peaks were "reserved for communications use" and were subjected to more stringent land use controls than previously existed.559/

IV. DISPOSAL, USE, AND OCCUPANCY OF PUBLIC LANDS FOR OIL AND GAS PIPELINES

A. Introduction

According to the Working Committee on Utilities, 560/ increased use of public lands can be expected for rights-of-way for oil and natural gas pipelines as well as production, storage, and distribution facilities such as compressor stations, pumping stations, storage tanks, meter and regulator stations, valves, blow-off stacks, vent pipes, signs, water crossing spans, fencing and fence markers, aerial markers, pig launchers and receivers, separator and dehydration units, storage yards for pipe and other materials, radio towers, offices and warehouses. Natural gas requirements are anticipated to triple by the year 2000 from 1967, when they were 18.8 trillion cubic feet. In December 1967, there were 166,739 miles of pipelines throughout the United States occupied by interstate natural gas pipelines, which are approximately sixty-five percent of all natural gas pipelines. Nearly seventy percent of the oil and other petroleum liquids consumed in the United States are presently transported in pipelines and this percentage is expected to increase.

Inasmuch as such increased consumption is expected to occur in existing market areas for both oil and natural gas, demands for additional lands needed for transmission pipelines and related facilities will be concentrated rather than dispersed.

B. Statutes Primarily Authorizing Gas and Oil Pipeline Use

1. The Mineral Leasing Act Governing the Secretary of the Interior and Similar Statutes

Two early acts providing for the placement of pipelines over public lands in Colorado and Wyoming and in Arkansas, respectively, appear to have been superseded by the Mineral Leasing Act of 1920. The first of these 561/ concerned rights-of-way for pipelines transporting oils, crude or refined. The latter 562/ concerned rights-of-way "for pipeline purposes" to transport "oil, crude or refined, or natural gas." Each was intended for the benefit of pipeline companies or corporations chartered to transport oil or gas, and each limited the use of the grant to construction, maintenance and care of the pipeline on it. 563/

The Mineral Leasing Act of February 25, 1920, as amended, 564/ authorizes rights-of-way over public lands including forest reserves for pipelines to transport oil or natural gas. The Justice Department has held this Act adequate authority to grant a right-of-way for a pumping station

reasonably necessary for the operation of a gas line. 565/ The 1920 Act further provided that "no rights-of-way shall hereafter be granted over said lands for the transportation of oil or natural gas except under and subject to the provisions, limitations, and conditions of this section." 566/ The Department of the Interior acknowledges that this proviso repealed and superceded the 1896 Act; 567/ it has not ruled on the 1910 Act, but the same result would clearly appear to be required. The Department has recognized that the Mineral Leasing Act constitutes its sole statutory authorization for oil pipeline rights-of-way even if a grant is sought merely to move oil from one subdivision of land to another within the same state and field. 568/

Those eligible for rights-of-way under the Mineral Leasing Act include citizens, associations, corporations and municipalities. 569/

Both Departments of Justice and Interior have held that this Act does not apply to purchased or acquired lands. 570/

Whether through design, oversight, or reliance upon early Department of the Interior opinions that public lands included Indian reservations carved from what was once the public domain, the 1920 Act did not encompass reservations other than forests. Oil and gas pipeline rights-of-way over Indian lands therefore still depend upon the Act of March 11, 1904, as amended, 571/ which authorizes such rights-of-way to unspecified classes of grantees, or upon the general purpose rights-of-way legislation governing these lands enacted in 1948. 572/

The Department of the Interior has ruled that it is permissible and a more efficient administrative practice to grant rights-of-way for private telegraph and telephone lines necessary to operate and maintain pipelines under the 1904 Act rather than to require that they be granted under statutes expressly dealing with such uses. 573/

2. Easements by Military Departments

Easements for rights-of-ways for oil pipelines and pumping stations for gas and oil pipelines can be granted over public lands permanently withdrawn or reserved for the use of a military department and other lands under his control by the Secretary of a military department. 574/ Copies of instruments covering public lands are given to the Secretary of the Interior. The terms are as the military secretary deems advisable and the sites are available to any citizen, association, partnership or corporation or a state, territory, commonwealth or possession. The easement cannot include more land than necessary 575/ and may be terminated for failure to comply with the terms of the grant, for nonuse

for a two-year period or for abandonment. The easement cannot be granted if against the public interest.

Similarly, easements for rights-of-way for gas pipelines can be granted. 576/ The burden is slightly different in that the Secretary of the military department must find that the grant will be in the public interest and will not substantially injure the interest of the United States in the property affected. Reports are made to the President.

C. Other Statutes Used for Oil and Gas Pipelines—Department of Agriculture

Since the Secretary of the Interior has not been given general authority to grant rights-of-way for oil and gas pipelines over acquired lands unless part of the natural forests, pipelines over lands acquired under Title III of the Bankhead-Jones Farm Tenant Act by the Secretary of Agriculture. He may lease or grant licenses and easements. 577/

The Forest Service also issues pipeline right-of-way permits as a special use under general authority to regulate and manage forest lands. 578/

While other general authority could be used for oil and gas pipelines, it is not often so used.

D. Detailed Discussion

The Mineral Leasing Act covers pipelines for transportation of oil and natural gas. 579/ To the Forest Service, however, a pipeline includes all pipelines regardless of what is being transported with the exception of water 580/ and covers pipelines for oil, gas and gasoline. 581/ It has not been determined whether the Mineral Leasing Act is construed broadly to cover pipelines for such substances as gasoline or manufactured gas, but the regulations provide for "oil, gas, or other similar products." 582/ However, the Act is broad enough to permit the use of sites for pumping stations and other structures reasonably necessary for the operation of a pipeline. 583/ Rights guaranteed an oil and gas lessee and/or operator in a Bureau of Land Management form 584/ include (in addition to the exclusive right to extract and dispose of oil and gas deposits in the lands lease) the right to construct and maintain on the leased lands all structures necessary to full enjoyment of the lease. Such structures include "all works, buildings, plants, waterways, roads, telegraph or telephone lines, pipelines, reservoirs, tanks, pumping stations or other structures." Such incidental rights-of-way cannot be utilized by a third party to provide these services to the lessee. 585/

However, the Mineral Leasing Act leases reserve to the Secretary of the Interior the right to grant easements over the leased lands to other persons. 586/

All rights to construct pipelines outside the boundaries of the leased lands derive from the Mineral Leasing Act. 587/

A right-of-way authorized by the Mineral Leasing Act includes a license, permit or easement and includes a site where that is applicable. 588/ The earlier Colorado, Wyoming and Arkansas Acts refer to "rights-of-way" only, while the Acts concerning Indian lands and military lands, respectively, refer to a "right-of-way in the nature of an easement" and "easements for rights-of-way." A Wyoming court construed the special right-of-way provision for oil pipelines over public lands in that state to confer a limited fee, consistent with contemporaneous Federal court interpretations of the interest conferred by a railroad right-of-way under the 1875 Act. 589/ Federal courts now construe railroad rights-of-way to be easements. 590/ No published judicial or administrative opinion exists treating this issue in the context of the oil and gas pipeline rights-of-way.

The Bureau of Reclamation issues easements for pipelines. 591/

The Forest Service has a class of special uses called utilities and communications which among other matters, deals with the transmission of fuels by special use permit, except where Federal Power Commission licenses are involved. 592/ The class is further divided into a group, pipelines, oil and gas transmission, for which a special use permit can be obtained. 593/

Easements can be obtained from the Secretary of Agriculture to use Bankhead-Jones Act lands.

Provision for express rights obtained by a grantee incident to the rights-of-way is sparse concerning oil and gas pipeline rights-of-way. The Act concerning Colorado and Wyoming lands authorized the grantee to take material, earth, and stone necessary to pipeline construction. 594/ Department of the Interior regulations also authorize extra rights-of-way for purposes of ingress and egress to the primary oil and gas pipeline rights-of-way. These also apply to Indian lands. A Federal court recently affirmed such rights to a grantee in addition to a right to use of the surface of the lands necessary to lay and maintain pipelines. 595/ No change in use of a pipeline can be made except with approval. 596/

Gas and oil pipelines under the Mineral Leasing Act can be on public domain lands and National forest lands derived from the public domain, lands received in exchange therefor, or lands received in exchange for timber therefrom. It does not apply to acquired lands for gas and oil pipelines. Department of Interior regulations provide that the applicant must enter into stipulations and execute such a bond as the Forest Service may require for the protection of the National forest. 598/

Gas and oil pipelines can be on any lands acquired under the Bankhead-Jones Farm Tenant Act. 599/ The rights-of-way are granted either by the Secretary of Agriculture or can be granted by the Secretary of the Interior as to those lands falling within the description of the Mineral Leasing Act for which the Secretary of the Interior grants rights-of-way. 600/ A permit can be issued under authority conferred on the Secretary of Agriculture for use and occupancy of National forests. 601/ Pipelines can also be on public lands permanently withdrawn or reserved for the use of a military department and other lands under control of the military department, 602/ as well as on Indian lands. 603/

The duration of the oil and gas pipeline rights-of-way presently available is limited only in the case of grants over Indian lands, which provides that rights herein granted shall not extend beyond a period of twenty years, although at the end of that period the Secretary of the Interior may extend the rights to maintain any pipeline constructed for another period not to exceed twenty years from the expiration of the first rights. 604/ Pipeline rights-of-way can be obtained by citizens, associations, corporations, and municipalities. 605/ In addition, upon obtaining approval of the Secretary, lessees may combine their interests in a lease for the purpose of establishing and constructing as a common carrier a pipeline as a common carrier. The application is filed with the Director, Bureau of Land Management. The application must show a reasonable need for the combination and that it will not result in any concentration of control over the production or sale of oil and gas which would be inconsistent with the anti-monopoly provisions of the law. 606/

The amount of land available for oil or gas line rights-of-way is fixed by statute in the Mineral Leasing Act 607/ as the ground occupied by the pipeline plus 25 feet on each side of it. 608/ The same limits were applied to Colorado and Wyoming lands by 43 U.S.C. § 962, but the Act concerning Arkansas lands 609/ limited the pipeline margins to 10 feet on each side. The acts concerning military lands and Indian lands are silent in this respect, presumably leaving the determination to administrative regulation or discretion. Forest Service special use permits are limited to the minimum necessary, usually no wider than 10 feet on each side of the centerline. 610/

Grants are discretionary under all the statutes, thus requiring application for an administrative approval of them before they are secured.

The two earlier special acts contained no express conditions precedent to the grant nor any administrative authority to regulate or condition them. Department of the Interior policy is that it possesses the right to impose reasonable conditions in the public interest, regardless of specific statutory authority, on grants which are discretionary with the administrative department.

The Mineral Leasing Act does allow the imposition of some conditions. The Secretary of the Interior can impose regulations and conditions as to survey, location, application and use. In addition, the grantee must agree to operate the pipeline as a common carrier and to convey oil or natural gas from Government lands in the vicinity of the pipeline in the amount the Secretary of the Interior finds reasonable. These common carrier provisions do not apply to natural gas pipelines regulated under the Natural Gas Act 611/ or those operated by a public utility subject to a state or local agency which regulates the rates and charges to consumers within the state or municipality. 612/

Any lessee of oil lands who owns or operates a pipeline which is accessible to the oil derived from the leased lands must also agree to convey Government and private oil at reasonable rates and without discrimination. 613/ Except for the exemption for natural gas pipelines, the regulations are worded to suggest that the common carrier obligations of natural gas and oil pipelines are the same. 614/

The Secretary of the Interior cannot extract detailed stipulations concerning the operation of the pipeline. He can only require a general stipulation by the applicant to agree to common carrier obligations; 615/ detailed conditions can deal only with physical aspects of the rights-of-way such as survey, location, application and use. 616/

No standard stipulations have been developed by the Forest Service for pipelines. 617/ The Forest Service does not include the common carrier clause in oil and gas lease stipulations since this clause is in the standard lease issued by the Department of the Interior. 618/

When a mainline pipeline on acquired lands is obtained by special-use permit, the Forest Service imposes common carrier provisions as used under the Mineral Leasing Act and imposes conditions for the purpose of controlling erosion. 619/ The standard lease terms issued by the Department of the Interior includes among other things the right to construct gathering pipelines, buildings, reservoirs and tanks. As to such

types of occupancies the Forest Service imposes their normal and special lease provisions. 620/

The earlier special Acts included forfeiture provisions for failure to complete the pipeline within specified periods of time after locating them. 621/ Rights-of-way obtained over military lands may be terminated for failure to comply with grant terms, nonuse or abandonment. Failure to comply with the requirements of that section of the Mineral Leasing Act permitting rights-of-way or Secretary of the Interior regulations and conditions is ground for forfeiture. 622/ The Director of the Bureau of Land Management will cancel rights-of-ways for failure to complete within the period allowed, which is usually five years, and for abandonment or nonuse. However, as with railroad rights-of-way, the Director does not cancel for violation of regulations of the Department of the Interior or for violation of the terms or conditions of the right-of-way. 623/ Cancellation is through court action. 624/

Uses which do not interfere with the pipeline use are reserved in a special use permit issued by the Forest Service. 625/ For example, an attempt is made to develop utility corridors to allow joint use of same right-of-way. 626/

The terms and conditions of a sample oil and gas pipeline easement for Title III of the Bankhead-Jones Farm Tenant Act include the following paragraphs. 627/

In the event of failure to use in a reasonable time or abandonment or violation of the grant, the United States may terminate the grant on 60 days; the title is not warranted and the rights or privileges are subject to any mineral reservations or other rights outstanding at the time of the grant; assignment without consent is not permitted; the grantee is liable for damage caused the United States and must save the United States harmless from all claims for use of the property; upon termination the grantee has a reasonable time to remove structures and if not removed they become the property of the United States; the United States can use and assign rights to use land for uses that do not interfere with the grant; grantee must take precautions to prevent soil and water pollution; the grantee must agree to revegetate areas denuded; the pipeline must be at least 20 inches below the ground; and the grantee must move and relocate structures if necessary to exercise grant.

Fees for Interior rights-of-way are generally at fair market value. 628/ Fees for special-use permits for oil and gas pipeline rights-of-way are based on land value as compared to private land rentals in the area 629/ with an annual minimum of \$2 per acre and not less than \$10 per mile

of pipeline. 630/ Fees can be more if the production capacities of timber or other resources on the land exceed the minimum fee. 631/

E. Review of Related Laws

The review of related laws summarizes the results of a search through Federal Power Commission Annual Reports and Federal Power Commission Reports. It also includes a short discussion of the Natural Gas Act and the Natural Gas Pipeline Safety Act of 1968. Generally, other than the informational nature of the summaries, they raise no significant problems of interest to a study of pipeline rights-of-ways on Section 10 lands.

The Annual Reports of the Federal Power Commission 632/ contain no material indicating a commission policy with regard to public land and show no apparent concern with the environment through which pipelines pass other than a developing interest in the promotion of pipeline safety legislation which is discussed supra.

The Commission Reports 633/ contain no material pertinent to the determination of routing of natural gas pipelines or right-of-way placement.

The Natural Gas Act 634/ declares that the business of transporting natural gas is affected with a public interest. 635/ The Act applies to the transportation of natural gas in interstate commerce and to natural gas companies engaged in transportation. 636/ The Act does not apply to persons engaged in transportation in interstate commerce of natural gas received by such person from another person within or at the boundary of State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation if the rates for the transportation are subject to regulation by a State commission. 637/

The Federal Power Commission may order improvement of transportation facilities and services, if such an action is in the public interest, and will not place an undue burden on the company and will not impair the natural gas company's ability to render adequate services to its customers. 638/ A natural gas company may not abandon all or any portion of its facilities without approval of the Commission and upon a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permits such abandonment. 639/ A certificate of public convenience and necessity is issued by the Federal Power Commission for any operation,

construction, extension of facilities of a natural gas company subject to its jurisdiction. The Commission may issue a temporary certificate in case of emergency to assure the adequate continuance of services, and the Commission may by regulation exempt from the requirements the section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.^{640/} The Federal Power Commission may issue regulations governing the form and manner of application for a certificate of public convenience and necessity.^{641/} The grounds upon which a certificate of public convenience and necessity can be issued are listed and such reasonable terms and conditions as public convenience and necessity may require can be imposed.^{642/} The power of eminent domain is granted to the holder of a certificate of public convenience and necessity.^{643/}

Regulations Under the Natural Gas Act^{644/} are in 18 C. F. R. §.152.1 et. seq. The regulations make no express or implicit reference to any Federal Power Commission policy in respect to the use of the public land. The regulations contain references to spatial characteristics of the various proposed and existing facilities under the jurisdiction of the Federal Power Commission, but these are merely descriptive and appear to have no relation to any conscious policy on the part of the Federal Power Commission, with regard to the utilization of public land for natural gas pipeline purposes. For example, procedure and forms for an application for an authorization to export or import natural gas require the applicant to submit a general or key map on a scale not greater than twenty miles to the inch, showing the physical location of the facilities utilized and the applicant's proposed export or import operations and to indicate with particularity the ownership of such facilities which are to be employed in the exportation or importation of natural gas.^{645/}

The regulations as to rates^{646/} also require a map showing the general geographic location of the company's principal pipeline facilities and of the points at which service is rendered under the tariff.^{647/}

Applications for certificates of public convenience and necessity and for orders permitting and approving abandonment under Section 7 of the Natural Gas Act must contain a geographical map of suitable scale and details showing, and approximately differentiating between all of the facilities proposed to be constructed, acquired or abandoned and existing facilities of the applicant, the operations or capacity of which will be directly affected by the proposed facilities or the facilities to be abandoned. The map, or an additional map, shall clearly show the relationship of the new facilities to the applicant's overall system and shall include 1) location, length, and size of pipelines; 2) location of

compressor stations; 3) location of each point of connection of existing and proposed facilities. 648/

In applications to abandon facilities or services the applicant must indicate the location of facilities and the requirements are similar to those found in 157.14(a)(6).

The Natural Gas Pipeline Safety Act of 1968 649/ defines "pipeline facilities" as new and existing pipe right-of-ways and any equipment, facility, or building used," but "rights-of-way" as used in the Act does not authorize the Secretary of Transportation to prescribe the location or routing of any pipeline facility.

The Secretary of Transportation is authorized to establish minimum Federal safety standards for transportation of gas and pipeline facilities. "Such standards may apply to the design, installation, inspection, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities. Standards affecting the design, installation, construction, initial inspection, initial testing shall not be applicable to pipeline facilities in existence on the date such standards are adopted." 650/ The Secretary of Transportation is empowered to order such steps as are necessary to remove hazards to life and property in a particular facility. The Secretary is required to establish safety standards which are practicable and designed to meet the need for pipeline safety. The Secretary is required to consider four factor groupings in prescribing Federal safety standards: 1) relevant available pipeline safety data; 2) whether such standards are appropriate for the particular type of pipeline transportation; 3) the reasonableness of any proposed standards; and 4) the extent to which such standards will contribute to public safety. The states are authorized to adopt such additional or more stringent standards for pipeline facilities and for the transportation of gas not subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act as are not incompatible with Federal minimum standards. The minimum Federal standards to be established are to preempt any state standards previously applicable to interstate transmission facilities.

Whenever an action by the Secretary under the Natural Gas Pipeline Safety Act of 1968 will affect continuity of any gas services, the Secretary shall consult with and advise the Federal Power Commission or the State commission having jurisdiction over the affected pipeline facility before establishing the standard or acting on the waiver application and shall defer the effective date until the Federal Power Commission or any such commission has had reasonable opportunity to add the authorizations it deems necessary. 651/ In any proceeding under the Natural

Gas Act 652/ for authority to establish, construct, or operate, or extend a gas pipeline which is or will be a subject to Federal or other applicable safety standards, any applicant shall certify that it will design, install, inspect, test, construct, operate, replace, contain the pipeline facilities in accordance with Federal and other applicable safety standards and plans for maintenance and inspection. Such certification shall be binding and conclusive upon the Federal Power Commission unless the relevant enforcement agency has timely advised the Commission in writing that the applicant has violated safety standards established pursuant to this chapter. The Act has assigned to the Federal Power Commission a passive role in the enforcement and establishment of natural gas pipeline safety regulations. The active role has been assigned to the Secretary of Transportation, and the burden of coming forward in the certification procedure under Title 15 has been placed on the Secretary of Transportation. The Act requires that the Secretary establish minimum safety standards before August 12, 1970. Apparently no such regulations have yet been published.

F. Observations About Gas and Oil Pipeline Use of Section 10 Lands

Section 28 of the Mineral Leasing Act of 1920 653/ is a broad statute covering much Section 10 land. It is administered in such a manner as to allow other agencies such as the Forest Service on National forest lands to require stipulations in leases and make comments on applications. Since the statute already covers so much Section 10 land, the statute might well be expanded to include all Section 10 lands and to incorporate the administrative practice of allowing other land holding agencies to require various stipulations and make comments.

Footnotes

1. Study of the Development, Management and Use of Water Resources on the Public Lands, U.S. Public Land Law Review Comm'l., S-33 (1969) (hereinafter cited as Water Resources).
2. Id.
3. FSM SS 2729.11-11(d), 2729.12, 2729.13, 2729.14, 2729.16, (Amend. No. 15, Jan. 1969) FSH SS 2713(16), (17), (26), (48), (49), (Amend. No. 106, July 1960).
4. See Howard A. Brown, A-30536, Riverside 04763, (May 31, 1966) (unpublished decision) (Secretary of the Interior affirming a decision of the Office of Appeals & Hearings, Bureau of Land Management).
5. 43 U.S.C. S 952 (1964).
6. 43 C.F.R. SS 2234.3-2(a)(i), 2234.4-1(b)(ii).
7. Id. S 2234.2-2(b)(2)(i).
8. Id. S 2234.3-2(f)(2).
9. Id. S 2234.3-2(e)(1).
10. Id. S 2234.3-2(c).
11. Id. S 2234.3-2(b)(2)(i).
12. 62 Stat. 17, 25 U.S.C. SS 323-328(1964).
13. 64 I.D. 70, M-36395 (1957).
14. Sen. Rpt. No. 823, 1948, U.S. Code Cong. and Adm. News 1033 (1948).
15. 64 I.D. 70, M-36395 (1957).
16. 25 C.F.R. S 161.19

17. See generally, PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT, 643-47 (P. L. L. R. C. STUDY, 1968) (hereinafter cited as Gates); Water Resources, supra. Note 1, AT158-62.
18. Jennison v. Kirk, 98 U.S. 453, 460-461, (1878); United States v. Hunter, 236 F. Supp. 178, 181 (S.D. Cal. 1964), aff'd in part, modified in part on other grounds, 388 F. 2d 148 (9th Cir. 1967).
19. United States v. Utah Power & Light Co., 208 F. 821 (D. Utah 1913).
20. Rockwell v. Graham, 9 Colo. 36, 37, 10 P. 284 (284) (1886); Simons v. Inyo Cerro Gordo Mining & Power Co., 48 Cal. App. 524, 192 P. 144 (1920); Peck v. Howard, 73 Cal. App. 2d 308, 167 P. 2d 753 (1946); Utah Light & Traction Co. v. United States, 230 F. 343 (8th Cir. 1915); Farley v. Spring Valley Mining & Irrigation Co., 58 Cal. 142 (1881).
21. See Pac. Gas & Elec. Co. v. United States, 45 F. 2d 708 (9th Cir. 1930), cert. denied, 283 U.S. 862 (1930); Utah Power & Light Co. v. United States, 243 U.S. 389, 406 (1917).
22. See Water Resources, supra. Note 1, AT 157-62.
23. 38 L.D. 302 (1909).
24. United States v. McIntire, 101 F. 2d 650, 654 (9th Cir. 1939); FPC v. Oregon, 349 U.S. 435, 448 (1955) (dictum).
25. State EX REL. Olding v. Stampfly, 69 Wash. 368, 372, 125 P. 148 (1912); see Cook v. Evans, 45 S.D. 31, 185 N.W. 262 (1921).
26. See Water Resources, supra. Note 1, AT 163-70.
27. See GATES, supra. Note 4, AT 640-42.
28. 25 Stat. 527.

29. See GATES, supra. AT 642.
30. Act of August 30, 1890, 26 Stat. 391, 43 U.S.C. § 945 (1964).
31. Dopps v. Alderman, 12 Wash. 2d 268, 121 P.2d 388 (1942), e.g., 58 I.D. § 490 (1943). The Act of December 5, 1924, 43 Stat. 704, 43 U.S.C. § 417 (1964) also specifically authorizes the United States to reserve to itself a "right of way or easement of any kind" required in connection with a reclamation project.
32. Ide v. United States, 263 U.S. 497, 501 (1924).
33. See discussion *infra*.
34. 58 I.D. 490 (1943).
35. 59 I.D. 46 (1947).
36. 43 U.S.C. §§ 946, 948 (1964).
37. Act of February 26, 1897, 29 Stat. 599, 43 U.S.C. § 664 (1964).
38. 43 U.S.C. § 949 (1964).
39. E.g., South Platte & Reservoir Co., 20 L.D. 464 (1895); 33 L.D. 389 (1904) (refusing rights of way for conduits to transport water for domestic uses).
40. 43 U.S.C. § 951 (1964).
41. Fraser Sources Irrigation & Power Co., 43 L.D. 110 (1914); United States v. Big Horn Land & Cattle Co., 17 F. 2d 357, 365 (8th Cir. 1927).
42. 43 C.F.R. § 2234.3-1(a)(v) (1969).
43. James S. Hoge, 14 L.D. 508 (1892) (natural lake); Penasco Reservoir, 13 L.D. 682, (1891) (river dam).
44. 43 C.F.R. § 2234.3-1(d) (1969); Hugh S. Ritter, 72 I.D. 111, (1965) (refusing to classify lands in Imperial and Riverside Counties of California under the desert land law where the Colorado River is the intended source of water for agricultural irrigation).

45. 1 WIEL, WATER RIGHTS IN THE WESTERN STATES, 61 (3rd. ed., 1911).
46. 29 Stat. 599, 43 U.S.C. § 664 (1964).
47. Neither the courts nor the Department of Interior had difficulty finding the 1891 Act applicable to lands within Indian reservations. *United States v. Portrent-March Valley Irrigation Co.*, 213 Fed. 601 (1905); 33 L.D. 563 (1905). However the Department held that it did not apply to lands allotted to Indians from public lands outside a reservation and held in trust for them by the federal government-Icicle Canal Co., 44 L.D. 511 (1916). Nor, did the Act apply to such lands as it did to other "public lands" because the allotment statute promised the allottee a fee simple free of all charges and encumbrances at the end of the trust period, not a fee subject to an easement of indefinite duration. Id.
48. 28 Stat. 408.
49. See discussion, supra.
50. 28 Stat. 635, 43 U.S.C. § 956 (1964).
51. *United States v. Utah Power & Light Co.*, 208 F. 821 (D. Utah 1913); 209 F. 554, 562 (8th Cir. 1913).
52. 31 Stat. 790, 43 U.S.C. § 959 (1964).
53. *Pine Mountain Water Co.*, 46 L.D. 240 (1917).
54. F.S.M. §§ 2729, 2729.11, 2729.13 (Amend. No. 15, Jan. 1969).
55. F.S.M. §§ 2729.12, 2729.13 (Amend. No. 15, Jan. 1969).
56. 43 C.F.R. § 2234.1-3(a)(3)(1969).
57. 43 U.S.C. §§ 661, 664, 946, 948, 951 (1964); 30 U.S.C. §§ 51, 52 (1964); 16 U.S.C. § 524 (1964).
58. 43 U.S.C. §§ 956, 959 (1964); 16 U.S.C. §§ 79, 522 (1964).
59. 77 C.J.S. 392 (1952); TIFFANY, REAL PROPERTY, § 538 (ABR. ed. 1940).

60. 43 C.F.R. §§ 2234.1-1(b)(9), 2234.1-3(a)(1) (1969).
61. Id.
62. Peck v. Howard, 73 Cal. App. 2d 308, 167 P. 2d 753, 761(1946).
63. John W. Wehn, 32 L.D. 33 (1903).
64. Whitmore v. Pleasant Valley Coal Co., 27 Utah 284, 286-287, 75 P. 748, (1904).
65. E.G., E. A. Crandall, 43 L.D. 556 (1915); Windsor Reservoir & Canal Co v. Miller, 51 L.D. 305 (1925).
66. E. A. Wight, A-24101 (Nov. 5, 1945); 67 I.D. 225 (1960).
67. United States v. Colorado Power Co., 240 F. 217 (D. Colo. 1916) (revocable-permit); United States v. Lee, 15 N.M. 382, 110 P. 607 (1910); Feather River Ry. Co., 71 I.D. 415 (1964).
68. 43 U.S.C. § 959 (1964); 16 U.S.C. §§ 79, 522 (1964).
69. Spokane & British Columbia Ry. Co., 39 L.D. 44 (1910); Verde River Irrigation & Power Dist., 56 I.D. 98 (1937); Kern River Co. v. United States, 257 U.S. 147, 155 (1921).
70. 57 I.D. 31 (1939); cf., 25 OPS. ATT'Y GEN. 470 (1905); 26 OPS. ATT'Y GEN. 421 (1907) (decisions concerning the right of the Secretary of Agriculture to charge for rights of way over forest lands).
71. 43 C.F.R. § 2234.1-6(c). (1969).
72. Id., § 2234.1-6(a).
73. Id.
74. F.S.M. §§ 2729, 2729.11 (Amend. No. 15, Jan. 1969).
75. F.S.M. § 2729.14 (Amend. No. 15, Jan. 1969).

76. DeWeese v. Henry Inv. Co., 39 L.D. 27 (1910); McMillan Reservoir Site, 37 L.D. 6 (1908); 64 I.D. 251 (1957); United States ex rel Sierra Land & Water Co. v Ickes, 84 F. 2d 228, 231 (D.C. Cir. 1936), cert. denied, 299 U.S. 562 (1936); Utah Power & Light Co. v. United States, 243 U.S. 389, 407 (1917).
77. 64 I.D. 251 (1957).
78. 29 L.D. 112 (1899).
79. U.S. ex rel Sierra Land & Water Co. v Ickes, 84 F. 2d 228 (Cir. 1936), cert. denied.
80. 43 C.F.R. § 2234.3-1 (1969).
81. E.g., Meyring Livestock Co., C-662 March 18, 1968 (unpublished decision).
82. In decisions such as Meyring Livestock Co. conditions such as reservation of public access over the reservoir site have been imposed. Federal courts have upheld them in decisions such as United States v. Rickey Land & Cattle Co., 164 Fed. 496 (N.D. Cal. 1908); Verde River Irrigation & Power Dist., v. Work, 24 F. 2d D.C. Cir. 1928, cert. denied, 279 U.S. 854 (1929).

Where the Bureau of Land Management has not attached such condition at the time of approving the grant, however, it may not thereafter unilaterally attach them at the behest of a state wildlife commission. Boccardo Corp., Nevada 034530 March 22, 1960 (unpublished decision). However, at least one federal court has held that the 1891 Act precludes a right of way holder from excluding the public from fishing in a reservoir constructed pursuant to it. United States v. Big Horn Land & Cattle Co., 17 F. 2d 357 (8th Cir. 1927).

83. Bear Lake Irrigation Co. v. Garland, 164 U.S. 1, 19 (1896); Clausen v. Salt River Valley Water Users' Ass'n., 59 Ariz. 71, 78-79, 123 P. 2d 172, (1942); Peck v. Howard, 73 Cal. App. 2d 308, 318-319, 167 P. 2d 753, (1946); Utah Power & Light Co. v. United States, 243 U.S. 389, 405 (1917).

84. E.g., *S. Pac. Co. v. Olympian Co.*, 260 U.S. 205, 208 (1922); *Sunderland v. United States*, 266 U.S. 226, 235 (1924); *United States v. Colo. Power Co.*, 240 F. 217, 221 (D. Colo. 1916); *United States v. Goldern Gate Bridge & Hwy. Dist.*, 37 F. Supp. 505, 510 (N.D. Cal. 1941).
85. 43 C.F.R. § 2234.1-3(c) (1969).
86. 43 C.F.R. § 2234.1-2(a)(2) (1969).
87. See Howard A. Brown, A-30536 Riverside 04763, May 31, 1966 (unpublished decision).
88. F.S.M. § 2729.12(b) (Amend. No. 15, Jan. 1969).
89. Id. §§ 2929.12(b), (d), 2729.12(d).
90. F.S.H. § 2713 (Amend. No. 106, July 1960).
91. F.S.M. § 2729.11(a) (Amend. No. 15, Jan. 1969).
92. Id. § 2729.11(b)(c).
93. Id. § 2729.14.
94. Id. § 2729.12(c)(3).
95. Id. § 2729.12(g).
96. See GATES, supra. Note 4, A7 550, 661-72.
97. 78 Stat. 808, as amended, 43 U.S.C. § 945a (1964).
98. 43 Stat. 704, 43 U.S.C. § 417 (1964).
99. Working Committee on Utilities, Report to the Vice-President and to the President's Council on Recreation and Natural Beauty (1968) hereinafter cited as Working Committee .
100. Id. 110
101. Id.

102. Statement by BRUCE RENWICK, Southern California Edison Co., Public Land Law Review Commission hearing, Washington, D.C., March 25, 1966.
103. Southern California Edison Co., Bureau of Land Management, Los Angeles 096498, at P.5 (May 28, 1964).
104. Id.
105. Hearings before the House Committee on Interior and Insular Affairs on Policies, Programs, and Activities of the Department of the Interior, 90th Cong., 1st Sess., ser. 90-1, pt. 5, at 55-56 (1967) hereinafter cited as Interior Hearings .
106. Id.
107. Working Committee 110.
108. Id.
109. Working Committee 111. Hydroelectric power is a cheap, non-pollutant, and efficient supplement to other power sources, and can be used in very specialized ways. Interior Hearings 56 n. 4.
110. Working Committee 114.
111. Id. 116.
112. Id. 111.
113. Interior Hearings 118-119..
114. Working Committee 73.
115. Department of Interior officials apparently also recognize the distinction. See Letter from Asst. Secy Holum to Rep. Harold T. Johnson, January 9, 1964, stating that most rights of way granted over government lands have been in "the distribution voltage class below 33 KV."

116. Working Committee 42. Bureau of Land Management refers all applications for rights of way for high voltage transmission lines, i. e., lines designed to transmit 138 kilovolts or more, to their Washington, D.C. office for coordination in issuance. Bureau of Land Management Instruction Memo. No. 68-19 (January 11, 1968).
117. Working Committee 42-44. Bills introduced in the 87th and 88th Congresses would have permitted FPC regulation of all lines of 230 or more kilovolt capacity transmitting in interstate commerce. H.R. Doc. No. 12181, S. Doc. No. 3432, 87th Cong., 2d Sess. (1962); H.R. Doc. No. 2101, S. Doc. No. 350, 88th Cong., 1st Sess. (1963).
118. Interior Hearings 58 n. 4
119. Earlier acts authorizing appropriation or use of public lands incident to impoundment or diversion of waters for irrigation, mining, timber, or manufacturing use although sometimes construed to permit generation of electric power, are not relied upon today for that purpose. The provisions of such statutes are described earlier in this chapter in conjunction with the existing federal legal system governing storage and transmission of water.
120. 29 Stat. 120, 43 U.S.C. § 957.
121. 28 Stat. 635, 43 U.S.C. § 956 (1964).
122. See Chapter VII, § 1, supra.
123. See *Utah Power & Light Co. v. United States*, 243 U.S. 389, 407 (1917); *Southern California Edison Co., Bureau of Land Management*, Los Angeles 096498 (May 28, 1964).
124. 31 Stat. 790, 43 U.S.C. § 959, 16 U.S.C. §§ 79, 522 (1964).
125. 36 Stat. 1253, as amended, 43 U.S.C. § 961, 16 U.S.C. §§ 5, 420, 523 (1964).
126. 41 Stat. 1063, as amended, 16 U.S.C. §§ 791a - 825r (1964).

127. Department of Interior regulations provide that "Except where the context of the regulation or of the Act of Congress on which it is based, indicates otherwise, when used in this chapter Chap. II, 43 C.F.R.:

(e) The words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals. 43 C.F.R. § 1810.1(e) (1969)."

128. See Discussion, supra. Chapter VII, § I.

129. Id.

130. 43 C.F.R. § 2234.1(b)(1) (1969); 5 Bureau of Land Management Manual § 3.8, App. II (Release 196, October 25, 1960).

131. 43 C.F.R. § 2234.1-4(a)(3) (1969).

132. Opinion of the Solicitor of the Department of the Interior, No. M. 30846, November 1, 1940; 43 C.F.R. § 2234.4-1(a)(4) (1969).

133. 43 C.F.R. § 2234.4-1(c)(7) (1969).

134. 43 C.F.R. § 2234.4-1(a)(3) (1969).

135. 43 C.F.R. § 2234.4-1(a)(1) and (2) (1969).

136. 43 C.F.R. § 2234.4-1(b)(4)(iii) (1969).

137. 43 C.F.R. § 2234.4-1(b)(2)(iv) (1969).

138. 43 C.F.R. § 2234-1-3(a)(3) (1969); 5 Bureau of Land Management Manual § 3.890 (Release 196, October 25, 1960).

139. See discussion, supra.

140. 43 C.F.R. § 2234.1(a)(1) and (2), (b)(9) (1969); 5 Bureau of Land Management § 3.84A (Release 196, October 25, 1960).

141. 43 C.F.R. § 2234.1(a)(2) (1969).

142. 43 C.F.R. § 2234.4-1(c)(8) (1969).
143. 43 C.F.R. § 2234.1-5(a) (1969).
144. United States v. Colorado Power Co., (NoU.L.) 240 F. 217 (D. Colo. 1916).
145. 43 C.F.R. § 2234.1-6(a) and (b) (1969).
146. 43 C.F.R. § 2234.1-6(f) (1969).
147. 43 C.F.R. § 2234.1-6(c) (1969).
148. 43 U.S.C. §§ 959, 961 (1964); 16 U.S.C. §§ 5, 79, 420, 522, 523 (1960).
149. See, e.g., Delmarva Power and Light Co., Bureau of Land Management, E.S. 3390 (May 17, 1968) (application for right of way for electric power line over wildlife refuge rejected on historical-esthetic and wildlife conservation grounds); Garkane Power Assoc., Inc., Bureau of Land Management, Utah 0140846 and 0141900 (October 4, 1965) (application for electric power substation in, and transmission line through national park rejected because of prospective impairment of scenic and recreational values).
150. 43 C.F.R. § 2234.1-3(c) (1969).
151. See Ch. III, use and occupancy overview, supra.
152. 43 C.F.R. § 2234.4-1(b)(4)(c)(1) (1969).
153. 5 Bureau of Land Management Manual §§ 3.8.9, 3.8.85, 3.8 Illustration 2 (Release 196, Oct. 25, 1960).
154. 5 Bureau of Land Management Manual § 3.8.9 (Release 196, Oct. 25, 1960).
155. But see discussion infra, for a recent judicial interpretation of the absolute liability clause required by the Forest Service in permits issued to private utility companies.

156. 28 Fed. Reg. 25712, codified in 43 C.F.R. § 2234.4-1 (1969). Similar regulations were adopted for Indian lands. 25 C.F.R. § 161.27 (1969).
157. 43 C.F.R. § 2234.4-1(c)(3) (1969). The cost to the grantee of such modifications is subject to equitable contact with the Department. Id.
158. "Transmission facility" is defined to include: "(a) all types of facilities for the transmission of electric power and energy and facilities for the interconnection of such facilities and (b) the entire transmission line and associated facilities... of which the segment crossing the lands of the United States forms a part." 43 C.F.R. § 2234.4-1(c)(5)(ii)(k) (1969).
159. 43 C.F.R. § 2234.4-1(b)(4) and (c)(5)(ii) (1969).
160. 43 C.F.R. § 2234.4-1(b)(4) and (c)(5)(ii)(c)(d) (1969).
161. 43 C.F.R. § 2234.4-1 (c)(4) and (5)(ii)(e), (f) (1969).
162. 43 C.F.R. § 2234.4-1(c)(5)(ii)(i) (1969).
163. 43 C.F.R. § 2234.4-1(c)(5)(ii)(l) (1969), e.g., the Department of Interior has waived wheeling stipulations in all cases dealing with transmission facilities covered by contracts for delivery of power from the Colorado River Storage Project. Letter from Asst. Secy of Interior Holum to Secy. of Agriculture Udall, December 2, 1963. See discussion, infra.
164. Letter from Secretary of Interior Udall to Senator Dirksen, June 6, 1963, p. 6 hereinafter cited as Udall-Dirksen Letter .
165. Id. 7; 27 Fed. Reg. 12954, Dec. 29, 1962.
166. Current Department of Interior policy guidelines provide that "Federal dams shall, where feasible, include facilities for generating electric energy; power disposal shall be such as to encourage the widest possible use of all electric power and energy that can be generated and marketed, to provide reasonable outlets therefor, and to prevent the monopolization thereof by limited groups; power generation and disposal shall be for the benefit of the general public, and particularly of domestic and rural customers; preference in power sales shall be given

to public bodies and cooperatives; and electric power and energy shall be made available to the ultimate consumer at the lowest possible rates consistent with sound business principles." Department of the Interior Manual § 160.1.2

167. Interior Hearings 55-56.
168. Statement of National Rural Electric Cooperative Ass'n. before the Public Land Law Review Commission, Jan. 11-12, 1968.
169. P. Gates, History of Public Land Law Development, Public Land Law Review Commission at 659 (1968).
170. Id.
171. Id. 659-660.
172. Act of June 17, 1902, 32 Stat. 388.
173. Act of April 16, 1906, 34 Stat. 116, 117.
174. Interior Hearings 55.
175. See discussion, supra.
176. 45 Stat. 1057, 43 U.S.C. §§ 617-617t (1964).
177. Interior Hearings 47-48.
178. 48 Stat. 58, 16 U.S.C. § 831 et. seq. (1960).
179. 50 Stat. 731, 16 U.S.C. § 832 et. seq. (1960).
180. 49 Stat. 1570, 33 U.S.C. § 701b et. seq. (1960).
181. Interior Hearings 49.
182. 52 Stat. 403, 16 U.S.C. § 833 et. seq. (1960).
183. 53 Stat. 1187, 43 U.S.C. §§ 375a, 387-389, 485 - 485k (1964).
184. Interior Hearings 47-48.
185. 58 Stat. 887, 16 U.S.C. § 825s (1960).

186. House Comm. on Government Operations, Certain Activities Regarding Power, Dept. of the Interior, H.R. Rep. No. 1975, 84th Cong., 2d Sess. 7 (1956) hereinafter cited as Power Activities Report .
187. The Secretary of the Interior does not market surplus power produced pursuant to the Tennessee Valley Authority Act.
188. Department of the Interior Manual § 730.2.9; 43 C.F.R. § 2234 (1969); 36 C.F.R. § 251 (1969); F.S. Manual § 1531.74 (Nov. 1968).
189. Interior Hearings 101.
190. Id. 104. Twenty-one federal dams were in existence in this region in 1967 and eight were then under construction. Id.
191. Id. 105.
192. Id.
193. Southeastern Power Administration delivers all power sold over nonfederal transmission facilities. Nonfederal agencies whose transmission lines have been utilized include R. E. A. -financed cooperatives. Address by Asst. Secy. of Interior Holum, Mountain-Pacific States Conference of Public Service Comissions Annual Meeting, Santa Fe, N.M., June 25, 1963. hereinafter cited as Address by Asst. Secy. Holum .
194. Interior Hearings 104.
195. 16 U.S.C. §§ 832, 832a(c) and (f) (1960).
196. Id. §§ 833, 833a(b).
197. Id. § 825s.
198. Letter from Secretary of Interior Udall to Rep. G. E. Senner, Jr., March 18, 1963, at 3 hereinafter cited as Udall-Senner Letter .
199. Power Activities Report 10; Letter from Assy. Secy. of Interior Holum to Rep. H. T. Johnson, Jan. 9, 1964 at 1; Udall-Dirksen Letter at 2.
200. Id.

201. Id. 11.
202. Id. 12.
203. 12 Fed. Reg. 3029.
204. 13 Fed. Reg. 6214; 43 C.F.R. § 245.21 (1949).
205. Power Activities Report 5, 24. cf. Testimony of Alvin W. Vogtle, Jr., Executive Vice President, The Southern Co., before the Public Land Law Review Commission, Arville, N. Car., May 29, 1967, p. 10, concerning money his company has spent redesigning lines to avoid use of public lands since 1963.
206. Id. 24.
207. Letter from Asst. Secy. BAKER to Rep. H. T. JOHNSON, Jan. 8, 1964 hereinafter cited as Baker-Johnson Letter .
208. Idaho Power Co. v. Chapman, Civil No. 4540-50 (D.D.C., filed Aug. 27, 1952); cf. F.P.C. v. Idaho Power Co., 344 U. S. 17 (1952) (imposition of an analogous condition under an F.P.C. license).
209. Idaho Power Co., Dept. of Interior, No. A-25936. (Sept. 19, 1950).
210. 65 Stat. 248, 254; See also S. Rep. No. 455, 83d Cong., 1st Sess. 16 (1953):

"The committee reiterates its view that efforts should be made to secure wheeling contracts wherever possible, and that the Federal Government should built transmission lines only when such agreements cannot be negotiated at comparable cost to consumers; the only exception to this policy would be with respect to main lines for the purpose of connecting Federal Hydroelectric plants, where the benefits... justify the expenditure."

As of August, 1960, such provision still was being incorporated into appropriations acts pertaining to Bureau of Reclamation activities. Public Works Appropriation Act of Sept. 10, 1959, Pub. L. No. 86-254, title II, 73 Stat. 491, 495.

The House Committee on Government Operations found in 1960 that the Bureau of Reclamation believed that Congress had adopted a firm policy of transmitting federal power wherever possible by wheeling over nonfederal lines, even though in given instances the Bureau with less expense could either construct transmission lines or discount its power rates to amortize construction by its customers. House Comm. on Government Operations, Sale and Transmission of Power (Bureau of Reclamation, Central Valley Project, Calif.), H.R. Rep. No. 2221, 86th Cong. 2d Sess. (1960).

- 211. S. Rep. No. 499, 82d Cong., 1st Sess. 23 (1951).
- 212. Id.
- 213. 19 Fed. Reg. 5178-79; Power Activities Report 6.
- 214. Power Activities Report 4-6, 20.
- 215. Id. § 6.
- 216. H.R. 10838, 84th Cong., 2d Sess. (1956); H.R. 3947, 85th Cong., 1st Sess. (1957); H.R. 3142, 86th Cong., 1st Sess. (1959); H.R. 6926, 86th Cong., 1st Sess. (1959); S. 1833, 86th Cong., 1st Sess. (1959); H.R. 7678, 86th Cong., 1st Sess. (1959); H.R. 3323, 87th Cong., 1st Sess. (1961).
- 217. Letter from Asst. Secy. of Interior HOLUM to Rep. H. T. Johnson, Jan. 9, 1964, at 3-4.
- 218. Id.
- 219. Idaho Power Co., Dept. of Interior, No. A-30294 (March 5, 1965) (distribution line over 33 kilovolt capacity serving a single group of irrigation pump installments for desert land
- 220. Southern California Edison Co., Dept. of Interior, No. A-30377 (June 11, 1965).

221. The standard form in which this reservation is made provides as follows:

"(i) The holder does not, by executing this stipulation, waive any rights which it might otherwise have to contest the validity or legal enforceability of the regulations, or any portions thereof, pursuant to which the right-of-way herein was granted, or the right of the Secretary to require the execution of this stipulation as a condition to the granting of said right-of-way.

(ii) This stipulation, or the parts thereof that are affected, shall be deemed to have been rescinded, without affecting the terms of said right-of-way in any other respect, in the event that there should be a final judicial determination (after all appellate proceedings, including certiorari, have been exhausted or the time therefor has expired) by a court of competent jurisdiction in a proceeding (by holder or others, whenever and whenever brought) in which the United States of the Secretary of the Interior is a party, that the regulations pursuant to which this stipulation was entered into, or any pertinent part thereof, are invalid or legally unenforceable, or that the execution of this stipulation, or any part thereof, cannot lawfully be required by the Secretary as a condition to the granting of said right-of-way."

222. See discussion, supra.
223. Power Activities Report 5-6.
224. Letter from Rep. H. T. Johnson to Secy. of Agriculture Freeman, Dec. 12, 1963.
225. F.P.C. v. Idaho Power Co., 344 U.S. 17, 23 (1952); see discussion, infra.
226. Udall-Dirksen Letter 7.
227. Memorandum from M. A. Chase to Asst. Secy. of Interior HOLUM, June 27, 1963, at 2 hereinafter cited as Chase Memo.
228. Udall-Dirksen Letter 2-3.
229. Utah Power & Light Co. v United States, 243 U.S. 389, 410 (1917).

230. Statement of Harold Quinton before the House Committee on Interior and Insular Affairs, Subcommittee on Public Lands, regarding H.R. 8070, Oct. 4, 1963, at 8-12 hereinafter cited as QUINTON Statement . See also Letter from American Electric Power Co., Inc. to Secy. of Agriculture Freeman and Secy. of Interior Udall, Exhibit 1, March 12, 1963.
231. Mr. Quinton testified, for example, that when building a line of transmission towers to carry only one circuit, initially a utility will sometimes plan, design, and construct at greater expense "double circuit" towers to provide for the stringing of a later second circuit. If such extra or second circuit position on the transmission towers were classified as a "surplus" facility and used by the Government for stringing a second transmission circuit, the utility, when such second circuit became needful, would have to build a second series of transmission towers for the stringing of one additional circuit. The differential in cost to the utility between the utilization of its originally planned second position on the first tower and the cost of a new series of tower structures, together with accompanying additional rights of way, could well run into thousands of dollars per circuit mile of line. QUINTON Statement 12-13.
232. Letter from Bruce Renwick, Southern California Edison Co., to G. Stubblefield, Daniel, Mann, Johnson, and Mendenhall, July 9, 1969.
233. Udall-Dirksen Letter 4.
234. Udall-Senner Letter 2.
235. See, e.g., Statement of Alvin W. Vogtle, Jr., Executive Vice President, the Southern Co., before Public Land Law Review Commission, Asheville, North Carolina, May 29, 1967 at 3 hereinafter cited as VOGTLE Statement :

... There are at least eighty-nine (89) "preference customers" for such power (from 10 federal power projects) in our service area who are already engaged in power distribution, in addition to many others who would qualify as preference customers, there are sixty-six (66) rural electric cooperative borrowers from Agriculture's Rural Electrification Administration in this area, two of which have had approved substantial generation and transmission loans from REA. Fifty-seven (57) of the sixty-five (65) distributing cooperatives obtained power requirements

from our companies. In our service area there are seven (7) national forests, five (5) national parks and monuments, as well as other lands scattered throughout such service area and administered by Interior, Agriculture or other agencies. From your Commission's preliminary survey of "Land Areas Embraced within Public Land Law Review Commission Study" of March 1966, we estimate that at least 1,800,000 acres of land in our service area are governed by these 1963 Interior-Agriculture regulations.

- 236. Vogtle Statement 8.
- 237. Udall-Dirksen Letter 3.
- 238. See discussion, supra.
- 239. Chase Memo 4.
- 240. Id.
- 241. Vogtle Statement 11-12.
- 242. Udall-Dirksen Letter 5.
- 243. Chase Memo 4.
- 244. Letter from Chairman Swidler, Federal Power Comm'n, to Secretary of Interior Udall, March 11, 1963, at 3.
- 245. Vogtle Statement 10-11 (quoting from the National Power Survey conducted by the F. P. C.); Udall-Senner Letter 3.
- 246. Udall-Senner Letter 2.
- 247. Chase Memo 3.
- 248. Id.
- 249. 210 Bureau of Reclamation Instructions § § 215.4.2, 4.3, 5.2, 6.2, and 7.2 (1968).
- 250. Id. § 215.4.2(0).
- 251. 16 U.S.C. § 797 (1960); 43 C.F.R. § 2234.1-3(e)(1) (1969).

252. 43 C.F.R. § 2234.1-3(e)(2) (1969).
253. Id.
254. See 50 C.F.R. § 29.21(a) (1969).
255. Id.
256. 50 C.F.R. § 29.21(b) (1969).
257. § 3637.
258. Id. § 3491.
259. Id.
260. Id.
261. 43 C.F.R. § 29.22 (1969).
262. 50 C.F.R. §§ 29.2, 29.5 (1969).
263. 16 U.S.C. § 523 (1964).
264. F.S. Manual § 2728 (Jan. 1969).
265. F.S. Manual §§ 2728.12c (Jan. 1969), 2752.1, 2754.1j
F.S. Handbook §§ 2754.2, 2755.4.
266. Agreement between the Federal Power Comm'n and the
Department of Agriculture, Sept., 1952. F.S. Manual
§§ 2755.5, 2755.51, 2755.52.
267. F. S. Manual § 2755.4.
268. F. S. Manual § 2751.11 (Sept. 1958); F. S. Handbook
§§ 2754.2, 2755.4, 2755.42.
269. F. S. Handbook § 2713(f) (Aug. 1968).
270. F. S. Manual § 2728.12a (Jan. 1969), 2751.55.
271. F. S. Manual § 2755.5, 2755.51, 2755.52.

272. 16 U.S.C. § 523 (1960); F. S. Manual § 2752.51 (April 1965).
273. F. S. Manual § 2728 (Jan. 1969).
274. Id.
275. F. S. Manual § 2752.2(10) (Sept. 1958); see F. S. Handbook § 2751.1.
276. 16 U.S.C. § 523 (1960); F. S. Manual § 2752.31(1).
277. F.S. Manual § 2752.2(3).
278. F.S. Manual § 2728.1 (Jan. 1969).
279. F.S. Handbook § 2713(d)(4) (Aug. 1968).
280. F.S. Manual §§ 2728, 2728.12g (Jan. 1969).
281. Id.
282. 16 U.S.C. § 523 (1960); F.S. Manual § 2752.32 (Sept. 1968).
283. 16 U.S.C. § 523 (1960); F.S. Manual § 2752.33 (April 1965);
F.S. Handbook § 2752.33 (July 1960).
284. F.S. Handbook § 2752.33 (July 1960).
285. Id.
286. F.S. Manual § 2752.33 (April 1965).
287. F.S. Handbook § 2713 (Aug. 1968).
288. F.S. Manual §§ 2752.3, 2728.12c (Jan. 1969).
289. F.S. Handbook §§ 2752.4(3), 2752.41 (July 1960).
290. F.S. Manual § 2728.12e (Jan. 1959).
291. F.S. Handbook § 2713c (Aug. 1968).
292. F.S. Handbook § 2752.42 (July 1960).

- 293. 16 U.S.C. § 523 (1960); F.S. Manual § 2752.2(1).
- 294. F.S. Manual § 2752.2(2) (Sept. 1958).
- 295. F.S. Manual § 2752.7 (April 1965).
- 296. Baker-Johnson Letter.
- 297. F.S. Manual §§ 2752.6, 2752.61(2); F.S. Handbook § 2751.52 (Sept. 1958).
- 298. 36 C.F.R. § 251.65 (1969); F.S. Handbook § 2751.2 (Sept. 1958).
- 299. F.S. Handbook § 2752.9 (Dec. 1965).
- 300. F.S. Manual § 2728 (Jan. 1969).
- 301. Id.
- 302. F.S. Manual § 2728.12c (Jan. 1969).
- 303. F.S. Handbook § 2751.52 (Sept. 1958).
- 304. Id. § 2751.53.
- 305. F.S. Manual § 2728.12 (Jan. 1969).
- 306. Baker-Johnson Letter.
- 307. F.S. Manual § 2703 (11).
- 308. Id. § 1531.74 (Nov. 1968); F.S. Handbook §§ 2752, 2752.81(3) (May 1965).
- 309. Id.
- 310. Address by Asst. Secy. HOLUM 4; Chase Memo 1-2.
- 311. Department of the Interior Manual § 730.2.8 (Sept. 1964).
- 312. F.S. Manual § 2728.12a (Jan. 1969).
- 313. F.S. Handbook § 2751.58 (Sept. 1958).

314. Id. § 2752.33 (July 1960).
315. 41 Stat. 1063
316. Pacific Power & Light Co. v. FPC 184 F.2d 272, 274-75 (D.C. Cir. 1950).
317. 16 U.S.C. § 803 (1964); Niagara Mohawk Power Corp. v. FPC 379 F.2d 153 (D.C. Cir. 1967); California v. FPC 345 F.2d 917 (D.C. Cir. 1965) cert. denied, 382 U.S. 941 (1965). See Public Land Law Review Commission Water Study pp 351-58.
318. FPC v. Idaho Power Co., 344 U.S. 17, 22 (1952).
319. 41 Stat. 1063 (1920), as amended, 16 U.S.C. § 797(c) (1964).
320. 16 U.S.C. § 796(12) (1964); Lake Ontario Land Dev. & Beach Protection Ass'n v. FPC, 212 F.2d 227, 232, (D.C. Cir. 1954), cert. denied, 347 U.S. 1015 (1954).
321. 16 U.S.C. § 796 (11) (1964).
322. 18 C.F.R. § 3.4 (1969).
323. 1950 Reorganization Plan No. 9, §§ 1-2, 15 F.R. 3175, 64 Stat. 1265.
324. Id.
325. 18 C.F.R. §§ 3.4(e)(2); 3.111 (1969).
326. 18 C.F.R. § 3.5 (1969).
327. 16 U.S.C. § 797(e) (1964); 18 C.F.R. § 4.30 (1969). Conversely, "licensee" is defined by the Act to include any "person, state, or municipality" licensed under it and successors and assignees of such licensees. 16 U.S.C. § 796(5) (1964) "Person" is defined by the act to include an "individual" or a "corporation," 16 U.S.C. § 796(4) (1964). Unlike the situation discussed infra in the text, the use of the term "person" rather than "citizen" to define "licensee" appears to be inadvertent and erroneous.

In contrast, where legislative aims and coordinations of rate regulations of Part II of the Federal Power Act compelled it,

the Supreme Court liberally construed the term "person" to include a county or a federal department. *United States v. Public Util. Commn.*, 345 U.S. 295, 312-316 (1953). In other situations, federal courts and the FPC have refused to include a municipality or a governmental body within that term. *Salt River Project Agricultural Improvement and Power Dist.*, 381 F. 2d 470 (D.C. Cir. 1968); *Paris v. Kentucky Util. Co.*, F.P.C. (Op. No. 525, Docket No. E-7249, August 4, 1967).

- 328. 16 U.S.C. § 796(7) (1964).
- 329. Id. § 796(3).
- 330. Id. § 797(f).
- 331. Id. § 800(b).
- 332. Id. § 800(b)(c).
- 333. Id. § 803(i).
- 334. Id. § 800(a), *Washington Pub. Power Supply Sys. v. FPC*, 353 F. 2d 840 (D.C. Cir. 1966).
- 335. Id.
- 336. Id.
- 337. 16 U.S.C. § 797(e) (1964).
- 338. Id. § 796(1); *FPC v. Oregon*, 349 U.S. 435, 448 (1955).
- 339. Despite the fact that United States' consent is required to sell, lease or grant an easement over such lands, a majority of the Supreme Court held that Congress did not intend to embrace within the term "reservations" as used in the Federal Power Act tribal lands within Indian reservations owned in fee simple because the United States retained no proprietary interest in them. *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 114-15 (1960). Otherwise lands within Indian reservations are considered to be "reservations" as defined by the act. *FPC v. Oregon*, 349 U.S. 435, 443-44 (1955).
- 340. 16 U.S.C. § 796(2) (1964).

- 341. Act. of March 3, 1921, 41 Stat. 1353, 16 U.S.C. § 797a (1964).
- 342. 16 U.S.C. § 814 (1964); 18 C.F.R. § 4.41 (1969).
- 343. 43 C.F.R. § 8.0 (1969).
- 344. 18 C.F.R. § 9.10 (1969).
- 345. 16 U.S.C. § 797(f), § 7981; 18 C.F.R. § 3.113; (1969);
FPC Form P-1.
- 346. 16 U.S.C. § 797(f); 7981 (1964); 18 C.F.R. § 4.80 (1969).
- 347. Washington Pub. Power Supply Sys. v. FPC 358 F. 2d 840,
845, 847 (D.C. Cir. 1966), reversed on other grounds, 387
U.S. 428 (1967).
- 348. 16 U.S.C. § 797(e), 799 (1966).
- 349. See discussion, infra; FPC Form L-6.
- 350. See discussion, infra.
- 351. 16 U.S.C. § 808(b) (1964).
- 352. 18 C.F.R. § 6.2 (1969).
- 353. 16 U.S.C. § 807(b) (1964).
- 354. 16 U.S.C. § 808(a) (1964); 18 C.F.R. §§ 2.6(a)-(d) (1969).
- 355. Id., § 807(a), Northern States Power Co. v. FPC, 118 F. 2d
141 (7th Cir. 1941).
- 356. 18 C.F.R. §§ 2.6(a)-(c) (1969).
- 357. 16 U.S.C. § 807(a) (1964).
- 358. Id. § 806; 18 C.F.R. § 6.3.
- 359. Id.
- 360. Id. § 820.

361. Id.
362. 18 C.F.R. § 3.119 (1969).
363. Northern States Power Co. v. FPC, 118 F. 2d 141 (7th Cir. 1941).
364. 16 U.S.C. § 803(e) (1964); 18 C.F.R. § 11.20 (1969).
365. In the case of FPC v. Idaho Power Co., discussed infra., Idaho Power Company was issued a license for rights of way for transmission lines over 125.647 miles of public land, 200 feet wide for 1.610 miles of this distance and 80 feet wide over the balance, plus 509.7 acres of public land for other facilities. The term of the license was 50 years. Annual payment for transmission line rights of way was set at \$819.00; an additional sum was assessed for the sites for other facilities.
366. 18 C.F.R. § 11.21 (1969).
367. 16 U.S.C. § 803(e)1 (1964); 18 C.F.R. §§ 11.22-.23 (1969).
368. 16 U.S.C. § 810(b) (1964).
369. Id. § 803(e); 18 C.F.R. §§ 11.20(b)(6), 11.24 (1969).
370. 16 U.S.C. § 803(e) (1964); 18 C.F.R. § 11.24 (1969).
371. Idaho Power Co. v. FPC, 346 F.2d 956, 906 (9th Cir. 1965).
372. 16 U.S.C. § 797(e) (1964).
373. See 18 C.F.R. § 2.7 (1969).
374. 16 U.S.C. § 814 (1964); FPC v. Tuscarora Indian Nation, 362 U.S. 99 (1960).
375. 16 U.S.C. § 818 (1964).
376. Id., § 799.
377. Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153. (D.C. Cir. 1967).
378. Idaho Power Co. v. FPC, 346 F.2d 956 (9th Cir. 1965).

379. FPC v. United Gas Pipeline Co., 386 U.S. 237 (1967).
380. Washington Pub. Power Supply Sys. v. FPC, 358 F.2d 840, 846, 848 (D.C. Cir. 1966).
381. 16 U.S.C. § 803(a) (1964).
382. Id. § 797(e).
383. Id. § 797(b).
384. Id.
385. Id. § 812.
386. Id. § 803(f).
387. Id., § 803(c).
388. 18 C.F.R. § 2.7 (1969).
389. Id., § 8.1.
390. Id., § 8.2.
391. Id., § 2.9.
392. 33 Ops. Att'y Gen. 262 (1932).
393. 16 U.S.C. § 803(e) (1964).
394. Form L-6, Revised September 1, 1965. 34 F.P.C. 1114.
395. 16 U.S.C. § 803(g) (1964); 18 C.F.R. § 2.9 (1969).
See e.g. the requirement imposed after hearings to permit the United States to use licensee's surplus capacity to transmit federal power upheld in FPC v. Idaho Power Co., 344 U.S. 17 (1952). Pertinent conditions in that case included the following provisions.

(2) After the initial construction of the lines or upon conversion of the lines to a higher voltage as herein provided, the licensee shall permit the United States, and the United States shall have the right, to interconnect any of its transmission facilities with said lines in a manner conforming to approved standards of practice for the interconnection of transmission circuits provided there is capacity available in said line or lines in excess of the needs of the licensee. The expense of such interconnection, including the expense of additional switching, relaying, and other protective devices, shall be borne by the United States, provided, however, that no such interconnection may be made without the prior approval of the Commission.

(3) Upon completion of any such interconnections, the United States shall have the right to transfer energy over said lines as initially or ultimately constructed in such amounts as will not unreasonably interfere with the licensee's use of said lines provided that the licensee shall be obligated to allow the transmission over the said lines by the United States of electric energy only to consuming facilities of the United States and to public bodies and cooperatives entitled to statutory preference in connection with the distribution and sale of electric energy by the United States.

(4) After any such interconnection of the facilities of the United States with said lines the licensee shall, except in emergencies, maintain in a closed position all connections under the licensee's control between the licensee's lines and the interconnecting facilities provided by the United States.

(5) Any interconnected power systems of the United States and the licensee shall be operated in parallel and in such manner as to render good and adequate service. Any inadvertent flow of energy from the lines of the United States which may occur while the lines of both the licensee and the United States are electrically interconnected shall mutually be compensated for by later return in kind. Any scheduled transfer of energy over said lines for the account of the United States shall be liquidated, on reasonable terms under agreements which shall be negotiated between the licensee and the United States, said agreements to be subject to approval by the Commission.

(6) Until such agreements are completed, settlement for any such scheduled transfers of power shall be made on the following basis: If power and energy from the lines of the United States is transmitted over these lines, the monthly payment for such transmission shall be the amount of dollars representing that part of the monthly cost to the licensee of the section of the lines or lines over which the power and energy is transmitted which the maximum transmission by the United States in kilowatts during the month bears to the kilowatt capacity of such section of line or lines. The monthly cost to the licensee referred to herein shall be computed in conformity with the uniform system of accounts prescribed by the Commission.

(7) In the event the licensee, its successors or assigns, during any period in which the United States is transmitting power over these lines, shall require reciprocal accommodations for the transfer of power from these project lines over any lines of the United States connected to said lines of the licensee, such reciprocal accommodations shall be accorded to the licensee under like terms and conditions as herein provided for the transfer of power from the lines of the United States over said lines of the licensee.

(8) If, at any time subsequent to the date upon which the licensee commences the transmission of energy over said lines for the United States, the licensee notifies the Commission that the licensee needs for the transmission of electric energy in connection with its operation the whole or any substantial part of the capacity of the said lines, or part thereof, then being utilized by the United States, and the licensee makes satisfactory provision for reimbursement to the United States of the original cost to the United States of the facilities desired by the licensee, less accrued depreciation on the investment of the United States, the licensee may modify or revoke the then existing agreement to remain interconnected and to transmit energy for the United States by giving to the Commission 30 months' notice, of the licensee's intention to utilize additional capacity or the entire capacity of the lines, or part thereof, as the case may be, provided, however, that the United States may continue to utilize any capacity in the said lines to the extent that said capacity, if any, was provided by the United States at its expense without reimbursement by the licensee.

(9) If at any time in the future the said lines of the licensee are proposed for alteration or are altered, the Commission reserves the right, after 30 days' notice and opportunity for hearing, to make a determination as to whether the lines after such alteration, either proposed or actual, will be subject to licensing by the Federal Power Commission under the then existing laws and regulations, and in the event that the Commission finds that the said alteration in the lines, either proposed or actual, so changes the functions served by said lines and the source of an energy transmitted over said lines as to make them, or any part of them, not subject to the licensing authority of the Commission under the then existing laws and regulations, the licensee hereby agrees to secure authority for the continued operation and maintenance of the lines, or such part of the lines, from the appropriate agency of the United States then having jurisdiction over the lands of the United States occupied by the lines, or part thereof, and upon securing said authority the licensee hereby agrees to surrender the license insofar as it authorizes operation and maintenance of the lines, or such parts thereof, which are found to be no longer subject to Commission jurisdiction. In the event that the licensee should fail to surrender the license insofar as it is applicable to the lines, or parts thereof, which may then be found by the Commission not to be subject to its jurisdiction, the Commission reserves the right to take appropriate action to have the license terminated with respect to said lines, or parts thereof, as provided in the then existing laws and regulations.

(10) Any agreement between the licensee and the United States in connection with said transmission lines or related facilities shall be effective only upon approval by the Commission. In the event the licensee and any agent of the United States are unable to agree with respect to any matter arising in connection with said transmission lines or related facilities, the question thereby raised shall be submitted to the Commission for determination.

To date the Federal Government has not requested permission to connect its transmission facilities pursuant to these provisions. Letter to R. G. Stubblefield, Daniel, Mann, Johnson, and Mendenhall from Bruce Renwick, Southern California Edison Company; June 23, 1969, p. 2.

396. Pacific Power Co. v. FPC 184 F.2d 272, 275, (D.C. Cir. 1950).
397. Order 14, 12 F.R. 8471 (Dec. 19, 1947).
398. 18 C.F.R. § 2.2 (1969).
399. Keating Gold Mining Co., 52 L.D. 671 (1929); 51 L.D. 41 (1925).
400. FPC v. Union Elec. Co., 381 U.S. 90 (1965). F.S.H. § 2754.12.
401. Pacific Power & Light Co. v. FPC, 184 F. 2d 272, 274, (D.C. Cir. 1950).
402. 30 Stat. 1151; Montana Power Co. v. FPC, 185 F.2d 491, 496 (D.C. Cir. 1950) cert. denied, 340 U.S. 947 (1951).
403. F.S.M. 2754.1; F.S.H. 2754.
404. 16 U.S.C. § 823 (1964); Montana Power Co. v. FPC 330 F. 2d 781, 782-83 (D.C. Cir. 1964).
405. 32 Ops. Att'y Gen. 525 (1921); Keating Gold Mining Co., 52 L.D. 671 (1929); 51 L.D. 41 (1925).
406. 16 U.S.C. § 816 (1964); Montana Power Co. v. FPC 185 F. 2d 491 (D.C. Cir. 1950), cert. denied, 340 U.S. 947 (1951); Montana Power Co. v. FPC., 330 F.2d 781, 782-84, (D.C. Cir. 1964); NN. 1-5; 36 C.F.R. § 251.8; F.S.H. § 2754.12.
407. Id.
408. Id.
409. F.S.M. § 2755.51 (Amend. No. 44, April 1965).
410. Id. § 2755.5.
411. 16 U.S.C. § 803(i) (1964); 18 C.F.R. § 3.114(c) (1969).
412. 18 C.F.R. § 3.114(c) (1969).
413. F.S.M. § 2755.52(2) (Amend. No. 44, April 1965).
414. F.S.H. § 2755.54(2)(a) (1958).

415. F.S.M. § 2755.1 (Amend. No. 44, April 1965).
416. F.S.H. § 2755.42 (1958).
417. Id., § 2755.33(1).
418. Id., § 2755.31(3).
419. Id., § 2755.33(1).
420. Id., § 2755.32(2).
421. Id., § 2755.32(3).
422. 16 U.S.C. § 662(a) (1964). See Water Resources, supra, AT 300; et seq., Note 4, 351-352.
423. See Hearings on S. 3167 Before the Senate Comm. on Interior and Insular Affairs, 89th Cong., 2d Sess., (1966).
424. F.S.H. § 2755.31(7). (1958).
425. Id., § 2755.32(7), 2755.53(4).
426. Id., § 2755.53(5).
427. 16 U.S.C. 808(b) (1964).
428. The Act does require the licensee to do as much as to assume such contacts as the United States would be required to do under 16 U.S.C. § 807 (Supp. IV, 1969) and to keep accounts and file annual and periodic reports concerning disposition of any project works covered by his nonpower license. 16 U.S.C. § 808(b) (Supp. IV, 1969).
429. 41 Stat. 1075, 16 U.S.C. § 818 (1964).
430. 43 C.F.R. § 2022 (1969); Bureau of Land Management § 2022 App. I (Release 2-25, Sept. 8, 1966).
431. 36 Stat. 847, 43 U.S.C. § 141-143 (1964).
432. 20 Stat. 394, 43 U.S.C. § 31 (1964).
433. 39 Stat. 218.

434. 40 Stat. 1179.
435. 31 Stat. 790 43 U.S.C. § 959 (1964); 16 U.S.C. § 79,522 (1964).
436. Id.
437. 36 Stat. 1253 16 U.S.C. § 523.(1964); 43 U.S.C. § 961(1964).
438. 5 Bureau of Land Management Manual § 2022 App. I (Release 2-25, Sept. 8, 1966).
439. 43 C.F.R. § 2022.3(a) (1969).
440. Patents or leases of powersite lands issued under the Recreation and Public Purposes Act or grazing or other nonmineral leases or contracts for disposal of timber, minerals, or other materials contain a disclaimer of liability of the Government, its permittees, lessees, or licensees for any damage resulting from use of any part of such lands for power development authorized by the United States.
441. 43 C.F.R. § 2022.3(b) (1969).
442. 16 U.S.C. § 497 (1964).
443. 50 U.S.C. App. § 1622(d) (Supp. 1968).
444. 43 U.S.C. § 682(a) (1964).
445. 43 U.S.C. § 869(a)(c) (1964).
446. 43 U.S.C. § 1421 (1964).
447. 7 U.S.C. §§ 1010-1013 (1964).
448. 43 U.S.C. §§ 711-731 (1964).
449. 43 U.S.C. § 561 (1964).
450. 7 U.S.C. § 1012(a), 16 U.S.C. § 478(a) (1964).
451. 43 U.S.C. § 1411-18 (1964).
452. 43 C.F.R. § 2410.0-5(a) (1969) (Emphasis Added.)

453. 43 C.F.R. § § 2410.0-5(b) & (c) 1969). (Emphasis Added.)
454. 43 U.S.C. § 1171 (1964).
455. 43 U.S.C. § § 374, 375, 375(b), 424 (1964).
456. 40 U.S.C. § § 483(a) & (c) (1964).
457. 43 U.S.C. § 959 (1964); 16 U.S.C. § 79 (1964).
458. United States v. Colorado Power Co., 240 F. 217, 220 (D. Colo. 1916).
459. United States v. Lee, 15 N.M. 382, 396, 110 P. 607, 612 (1910).
460. 16 U.S.C. § 522 (1964). The statute is reprinted in identical form in 43 U.S.C. § 961 (1964), U.S.C. § § 5, 420, 523 (1964).
461. F.S. Manual § 2728.22 (Amend. No. 15, Jan. 1969).
462. Id. § 2728.22e2.
463. Working Comm. on Util., Report to the Vice President and to the President's Council on Recreation and Natural Beauty 6 (1968).
464. Id.
465. Id.
466. 47 U.S.C. § 701(a) (1964).
467. 47 C.F.R. § 25.203(a) (1969).
468. F. S. Manual § 2728.22f (Amend. No. 15, Jan. 1969).
469. Id. § 2728.22j.
470. Id. § 2728.22d.
471. Id. § 2728.22c.
472. Id. § 2728.22d.

- 473. Id.; F. S. Handbook S 2752.81 (Amend. No. 139, Dec. 1961).
- 474. F.S. Manual § 2728.22d (Amend. No. 15, Jan. 1969).
- 475. F.S. Handbook § 2752.81 (Amend. No. 139, Dec. 1961).
- 476. Id.
- 477. Id.
- 478. Id.
- 479. Id.
- 480. F.S. Manual § 2728.22c (Amend. No. 15, Jan. 1969).
- 481. Id.
- 482. Id.
- 483. See 47 C.F.R. § 1.70(c) (1969).
- 484. F.S. Manual § 2728.22c (Amend. No. 15, Jan. 1969).
- 485. * F.S. Handbook § 2752.81 (Amend. No. 139, Dec. 1961).
- 486. 36 C.F.R. § 251.2 (1969); F. S. Manual § 2728.22 (Amend. No. 15, Jan. 1969).
- 487. F.S. Handbook § 2752.81 (Amend. No. 139, Dec. 1961).
- 488. F.S. Manual § 2728.21 (Amend. No. 15, Jan. 1969).
- 489. Id.
- 490. Id. S 2728.22c.
- 491. Id. S 2728.21
- 492. Id. S 2728.21a1.
- 493. Id.
- 494. Id.

- 495. 16 U.S.C. § 551 (1964).
- 496. F.S. Manual § 2728.23 (Amend. No. 15, Jan. 1969).
- 497. F.S. Handbook § 2752.61 (1958).
- 498. F.S. Manual § 2728.23 (Amend. No. 15, Jan. 1969).
- 499. Id.
- 500. F.S. Handbook § 2752.7 (Amend. No. 139, Dec. 1961).
- 501. F.S. Manual § 2752.61 (Amend. No. 44, April 1965).
- 502. F.S. Handbook § 2752.61 (1958). The individual grant may provide for different periods of regular readjustment.
- 503. Id. § 2713.68(c) (Amend. No. 23, Feb. 1962).
- 504. Id.
- 505. 43 U.S.C. §§ 1411-1418 (1964), as amended, (Supp. IV, 1969).
- 506. 43 C.F.R. § 2410 (1969).
- 507. 48 Stat. 1064 et seq, as amended, 47 U.S.C. §§ 151-609 (Supp. IV, 1969). The responsibilities and policies of the Commission are almost exclusively found in Title 47 of the United States Code and Title 47 of the Code of Federal Regulations. Chapter Five, "wire or radio communication", of Title 47 U.S.C. contains virtually all of the statutes relevant to occupancy of Section 10 lands. Thus, this discussion will deal basically with that chapter and the regulations promulgated from it.
- 508. American Broadcasting Co. v. FCC, 191 F.2d 492 (D.C. Cir. 1951).

509. United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968); Allen B. Dumont Laboratories v. Carroll, 184 F.2d 153 (3d Cir. 1950), cert. denied, 340 U.S. 929 (1951); Kaufman v. Western Union Tel. Co., 224 F.2d 723 (5th Cir. 1955), cert. denied, 350 U.S. 947 (1956).
510. 47 U.S.C. § 153(d) (1964).
511. Id. § 153(h).
512. Id. § 319(d).
513. Id. § 319(a).
514. 47 C.F.R. § 1.70 (1969); 6 F.C.C. 2d 577 (1967); 31 Fed. Reg. 6063 (1966).
515. 47 C.F.R. § 97.3(b)(c) (1969).
516. Id. § 97.41(c).
517. 31 F.R. 6063 (1966).
518. Id.
519. Id.
520. 47 C.F.R. § 1.70(a) (1969).
521. FCC Form 301.
522. Id. § V-A.
523. Id. § V-A(10).
524. 47 C.F.R. §§ 21.15(o), 21.16(p), 23.20(b)(c) (1969).
525. FCC Form 301 § V-G.
526. Id. § V-A(12).
527. FCC Form FAA-117;

528. 47 C.F.R. § 1.61 (1969).
529. Id.
530. See, Id. §§ 17.8, 17.9.
531. Id. For procedures when such antenna form area have been established, see Id. § 1.61(g)(1)-(3).
532. Id. § 1.61
533. Id. § 1.70(b).
534. Id.
535. Id. § 1.70(c).
536. Id.
537. Id. § 1.70(e).
538. Bureau of Land Management Memo No. 68-338, Encl. 1-1, (Sept. 4, 1968) (sample) notice of site availability.
539. 47 C.F.R. § 1.70(d) (1969).
540. Id. § 1.70(e).
541. If the FCC issues a construction permit work must begin within sixty days and construction must be completed within six months after that unless a "proper showing" is made to the FCC justifying an exception. If the station is not completed within the time specified, the permit is automatically forfeited. 47 C.F.R. §§ 1.598. 1.599 (1969).
542. Bureau of Land Management Instruction Memo No. 68-388 (Sept. 4, 1968); 5 Bureau of Land Management Manual § 3.9. . 100B(2)(b). Under the only existing authority for fees, no separate fee is charged where a "pre-permit" is issued under the 1911 Act. 43 C.F.R. § 2234.13(b)(1) (1969); El Paso National Gas Co., N.M. 046334 (June 16, 1966) (unpublished decision).
543. Bureau of Land Management Instruction Memo L & R -80 (May 14, 1963).

544. We note also in passing that responsibility for enforcing the duty of railroads and telegraph companies receiving Federal subsidies including lands to construct and maintain telegraph lines under an 1888 statute have been transferred from the Interstate Commerce Commission to the FCC under the Federal Communications Act of 1934, 47 U.S.C. §§ 9, 11. The Attorney General is authorized to prevent unlawful interference with the equities of the United States arising from any liens it might obtain on such telegraph lines thereby. Id. § 12.
545. 47 U.S.C. § 214(d) (1964).
546. Id. § 202(a).
547. Id. § 213(c).
548. Id. § 213(d); FCC Form 301 § III(1)A
549. 47 U.S.C. § 213(a) (1964).
550. Id. § 301.
551. See *FCC v. R.C.A. Communications, Inc.* 346 U.S. 86, 91, 94-95 (1953) (FCC action should be based on the needs of the regulated industries, not on abstract national policy.) and *National Broadcasting Company v. U.S.*, 319 U.S. 190, 216-219 (1943) (generalities unrelated to the living problems of radio communication cannot justify commission action).
552. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168-172 (1968).
553. Id., § 178.
554. 47 U.S.C. § 309(d)(1). A federal court recently held that such persons include "responsible spokesmen for representative groups having significant roots in the listening community".

Office of Communication of United Church of Christ v. FCC, 359 F. 2d 994, 1005 (D.C. Cir. 1966).

47 U.S.C. § 312(a)(2) (1964).
556. Id. §§ 312(a)(4)-(5).

557. Bureau of Land Management Information Memo No. 67-29, AT3 (Feb. 27, 1967).
558. Id.
559. Id. 7-8.
560. Report to the Vice-President and to the President's Council on Recreation and Natural Beauty 44 (1968).
561. Act of May 21, 1896, 43 U.S.C. § 962 (1964).
562. Act of April 12, 1910, Id. § 966.
563. Id. §§ 965, 968.
564. 30 U.S.C. § 185 (1964).
565. 36 Op. Att'y Gen. 480 (1931).
566. 30 U.S.C. § 185 (1964).
567. 51 L.D. 41 (1925).
568. Frances R. Reay, 60 I.D. 366 (1949).
569. 30 U.S.C. §§ 22, 48, 181 (1964); 43 C.F.R. § 2234.5-1(a)(1) (1969).
570. 40 Op. Att'y Gen. 9 (1941); Chiles P. Plummer, A-23988 (Feb. 24, 1945).
571. 25 U.S.C. § 321 (1964).
572. Id. § 325.
573. Rights of Way Over Allotted Indian Lands, 58 I.D. 759 (1944).
574. 10 U.S.C. § 2668 (1964).
575. Id. § 2668(a).
576. Id. § 2669.
577. 7 U.S.C. §§ 1011(c)-(d) (1964).

578. 16 U.S.C. § 551 (1964); F.S. Manual § 2728.11 (Amend. No. 15, Jan. 1969).
579. 30 U.S.C. § 185 (1964).
580. F.S. Manual § 2728.11 (Amend. No. 15, Jan. 1969).
581. F.S. Handbook § 2713.41 (Amend. No. 7, July 1967).
582. 43 C.F.R. § 2234.5-1(d) (1969).
583. Id. § 2234.5-1(e) (1968); 36 Op. Att'y Gen. 480 (1931).
584. Form 4-1158, August 9, 1961.
585. Bureau of Land Management Memorandum from Chief of Division of Lands and Minerals Management, October 29, 1962, C.04b-1.
586. 30 U.S.C. § 186 (1964).
587. Francis R. Reay, Lessee; Standard Oil Co. of Calif., A-25747, October 17, 1949. See Solicitor's Memorandum Opinion, M-36584, 66 I.D. 361, October 20, 1959, as supplemented by Salt Lake Field Solicitor's Memorandum Opinion, November 3, 1961.
588. 43 C.F.R. § 2234.1-1(b)(9) (1969).
589. Richardson v. Midwest Refining Co., 39 Wy. 58, 270 P. 154 (1928).
590. Great Northern R. Co. v. United States, 315 U.S. 262 (1942).
591. B.R. Instructions § 216.4 (July 26, 1957).
592. F.S. Manual § 2728 (Amend. No. 15, Jan. 1969).
593. Id. § 2728.11; F.S. Handbook § 2713.41 (Amend. No. 7, July 1967).
594. 43 U.S.C. § 962 (1964).
595. Appleton v. Kennedy, 268 F. Supp. 22 (N.D. Okla. 1967).

596. 43 C.F.R. § 2234.5-1(c) (1969).
597. 30 U.S.C. § 185 (1964); 43 C.F.R. § 2234.5-1(a)(3) (1969); F. S. Manual § 2751.1 (1958); F.S. Handbook § 2751.1 (1958); 40 Op. Att'y Gen. 9 (1941); Chiles P. Plummer, A-23988, Feb. 24, 1945.
598. 43 C.F.R. § 2234.1-3(d) (1968); F.S. Handbook § 2750 (1958).
599. 7 U.S.C. § 1011(d) (1964).
600. F.S. Manual § 2751.1(4) (1958).
601. 16 U.S.C. § 551 (1964); F.S. Manual § 2728.11 (Amend. No. 15, Jan. 1969).
602. 10 U.S.C. §§ 2668-2669 (1964).
603. Indian lands are not within the scope of this study.
604. 25 U.S.C. § 321 (1964).
605. 30 U.S.C. §§ 22, 48, 181 (1964).
606. 43 C.F.R. § 3121.5 (1969).
607. 30 U.S.C. § 185 (1964).
608. F.S. Manual § 2751.24 (Amend. No. 51, May 1965).
609. 43 U.S.C. § 966 (1964).
610. F.S. Manual § 2728.11a (Amend. No. 15, Jan. 1969).
611. 15 U.S.C. § 717w (1964).
612. 30 U.S.C. § 185 (1964); 43 C.F.R. § 2234.5-1(a)(2) (1969).
613. 30 U.S.C. § 185 (1964).
614. 43 C.F.R. § 2234.5-1(a) (1969).
615. Id. § 2234.5-1(b).

- 616. Chapman v. El Paso Natural Gas Co., 204 F.2d 46 (D.C. Cir. 1953).
- 617. F.S. Handbook § 2713.52a
- 618. F.S. Manual § 2751.34
- 619. F.S. Handbook § 2713.48-3.
- 620. F.S. Manual § 2824.42.3.
- 621. 43 U.S.C. §§ 964, 969 (1964).
- 622. 30 U.S.C. § 185 (1964).
- 623. F.S. Manual § 2751.43 (Amend. No. 51, May 1965).
- 624. 30 U.S.C. § 185 (1964); 5 Bureau of Land Management § 3.8.50C(1), Release 264 (Oct. 10, 1964).
- 625. F.S. Manual § 2728.11b (Amend. No. 15, Jan. 1969).
- 626. Id. § 2728.1.
- 627. F.S. Handbook § 2752.83 (1958).
- 628. 43 C.F.R. § 2234.1-6 (1969).
- 629. F.S. Manual § 2751.3 (Amend. No. 12, Oct. 1968).
- 630. Id. § 2728.11c (Amend. No. 15, Jan. 1969).
- 631. F.S. Handbook § 2713.41 (Amend. No. 15, July 1967).
- 632. FPC Annual Reports 1938, 1939. 1946-68.
- 633. FPC Reports, vols 1-36.
- 634. 15 U.S.C. §§ 717-717w (1964).
- 635. Id. § 717(a).
- 636. Id. § 717(b).
- 637. Id. § 717(c).

- 638. Id. § 717f(a).
- 639. Id. § 717f(b).
- 640. Id. § 717f(c).
- 641. Id. § 717f(d).
- 642. Id. § 717f(e).
- 643. Id. § 717f(h).
- 644. Id. § 717o.
- 645. 18 C.F.R. § 153.4 (1969).
- 646. Id. §§ 154.1-110.
- 647. Id. § 154.37.
- 648. Id. § 157.14 (a)(6) (1969).
- 649. 49 U.S.C. § 1671(4) (Supp. IV, 1969).
- 650. Id. § 1672(b).
- 651. Id. § 1676.
- 652. 15 U.S.C. §§ 717-717w (1964).
- 653. 30 U.S.C. § 185 (1964).

CHAPTER VIII

TRANSPORTATION USES

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I. GROUND TRANSPORTATION

A. Public Highways

The earliest legislation concerning a transportation use of public land was enacted in 1866. 43 U.S.C. § 932 (1964) grants a right of way for the construction of highways over public lands not reserved for public uses. While a railroad is a highway within the meaning of the statute 1/ the statute was not widely used for railroad purposes because the decisions including railroads within the statutory authorization were not handed down until 1879.

The grant remains in abeyance until the highway is established when it becomes immediately effective. 2/ Formal acceptance of the grant is manifested by construction of the highway or by public user in conformity with state law. 3/ A highway established by a public user must be only of reasonable width necessary for use of the public as defined by a well-marked line of travel. 4/ The question of width is a matter of state law. The grant under this authority is meant to be only an easement. 5/ The effect of the statute is to take the granted interest out of the public domain, and any subsequent patentee to the underlying fee takes the land subject to the easement. 6/

Since no action on the part of the Government is necessary to grant the right of way, no application need be filed. 7/ Department of Interior regulations point out that the grant does not extend to rights of way for highway facilities which require the filing of an application under other provisions of the law. However, where usual highway facilities do not impair the scenic or recreational values of the area and consent is obtained, the Department of Interior will waive the application requirement unless the facilities are electric transmission lines of 33 Dw or more or oil and gas pipelines more than 2 miles long and not part of any other pipeline crossing public lands. 8/

The statute deals specifically with public lands that are not otherwise reserved for public uses. Department of Interior regulations provide that a right of way over public land reserved for public uses under the jurisdiction of the Department and Revested and Reconveyed lands may be obtained by filing an application under the general regulations governing rights of way. 9/ The application must be accompanied by

a map showing the location of the proposed highway. 10/ No rights are acquired by reason of merely filing the application: in the case of reserved lands, the reservation must be revoked or modified so as to permit construction of the highway, subject to such terms and conditions as may be necessary for the adequate protection and utilization of the reserve; in the case of revested and reconveyed lands, the Bureau of Land Management must grant permission to construct the highway subject to such terms and conditions as may be necessary for the maintenance of the objectives of the Act of August 28, 1937, 11/ and for the adequate protection and utilization of the lands. 12/

No charge is made for rights-of-way issued under this authority. 13/ However, all holders of rights-of-way under this authority are subject to the terms and conditions imposed by the Bureau of Land Management on holders of rights-of-way generally. 14/ Additionally, when the holder of a highway right-of-way constructs usual highway facilities for which an application is not required, he must comply with those general conditions which are appropriate to the construction and maintenance of the facilities. 15/

B. Railroad Rights of Way

1. Special Grants

The special grants of rights-of-way to railroads, which preceded the general grants and opened up the West, were in the nature of specific Congressional authorizations granting specifically described lands to named grantees. Eighty-nine special grants were awarded in the 21 years between 1850 and 1871. Of these 17 were later forfeited for failure to construct. 16/

The historically important grant to the Union Pacific made in the Act of July 1, 1862 17/ is illustrative. The terms of this statute will be set out as typifying the special grants to railroads.

The acreage commitment was 200 feet on each side of the railroad. For purposes of aiding construction, alternate sections of public lands, designated by odd numbers, to the amount of 10 alternate sections per mile, on each side were granted. Such sections had to be within twenty miles of each side of the road and not reserved or disposed of by the United States. In addition to this land immediately available, the Secretary of Interior was authorized to withdraw from private sale or entry lands within 25 miles of the railroad upon submission of a map of the general route.

The interest granted was a right of way over public lands for the road and grants in place for the alternate sections. Although the lands were

granted without consideration, the statute specifies that the grants in place which were not sold or disposed of by the railroad within three years after the entire road was completed would be subject to settlement at a price not exceeding \$1.25 per acre, payable to the railroad.

Grants were conditioned on the railroad's financial responsibility, maintenance of road and telegraph lines, transmission of dispatches, transport of mails and troops, etc. Further, the statute included a provision that, should the railroad's net earnings exceed 10 per cent, Congress would have the right to reduce rates.

Finally, the company was required to file an asset to the legislation in the Department of Interior within one year after passage of the statute and to pledge that it would complete the railroad. Congress reserved the right, at any time, to add to, alter or amend the authorizing act.

2. The General Railroad Right of Way Act

In reaction to growing dissatisfaction with the Government's making special grants to individual railroads, described by many as a giveaway policy, the General Railroad Right of Way Act 18/ was passed in 1875. While the Act represents the major legislation in the area of railroad rights of way, it does not apply to lands reserved from sale, including military, park, and Indian reservations. 19/ Special statutes providing for rights of way over these classes of land were passed subsequently. 20/

Under the Act, the railroad is given a right of way 100 feet wide on each side of the central line of the railroad. Additionally, the railroad is given the right to take from adjacent public lands the materials necessary for constructing the road and the right to use adjacent grounds for station buildings, depots and like uses. 20/ The extent of "adjacent ground" available has been interpreted: if federal court has held that timber for construction purposes may not be taken from land more than three miles distant 22/ (cite); and a Bureau of Land Management decision has held that adjacent station grounds means adjoining grounds and cannot include lands five miles distant. 23/

The Act provides that the railroad company must, within twelve months after the location of any section of 20 miles of its road if the land is surveyed or within twelve months after a Government survey if the land is unsurveyed, file a profile of the road. When the profile is approved by the Department of Interior, the land is then subject to the right of way. 24/ An 1892 case held that the right of way is acquired by construction or by filing a profile with the Secretary of the Interior, the statute

being in the form of an offer which can be accepted in either of these two ways. 25/

The maps of profiles must be filed in the land office of each district which the right of way traverses. Crossroad station numbers and field notes must be shown. All subdivisions of public surveys should have the entire boundary drawn. Land affected by the right of way must show boundaries of forty-acre tracts and lot boundaries. The terminal must be fixed by reference to the corner of a public survey. If the land is unsurveyed, the terminal must be connected to a survey if not more than six miles distant. If more than six miles distant, the terminal must be connected by course and distance to an immovable permanent monument. If the right of way crosses both surveyed and unsurveyed land, separate maps must be submitted. No Department of Interior approval can be given until after the survey. The railroad must submit a statement of an engineer of the termini and length of the route, the station grounds shown by the initial point, the area in acres, and the smallest legal subdivision of the surveyed land in which it is located. Short branch lines can be shown on the same map, but longer ones require a separate map. When construction is finished, a certificate to that effect must be filed. No new map is required unless there are deviations from the original, in which case new route approval is necessary and the railroad must relinquish the old right of way. 26/

The Act provides that if any section of the road is not completed within 5 years after location, all rights as to the uncompleted section are forfeited. 27/ Further, the right of way may be terminated by abandonment, nonuse, or for violations of the terms and conditions of the grant or of pertinent regulations. 28/

The Act itself does not state whether termination is to be accomplished by legislative, judicial, or administrative act. The General Forfeiture Act of September 29, 1890 29/ was passed to declare forfeitures of in-place grants under the special acts in cases where the railroad failed to construct its line; the forfeited land was declared to be part of the public domain. 30/ And in 1909 Congress passed a statute declaring the forfeiture of unbuilt railroad sections under the 1875 Act. 31/ Clearly Congress can declare a forfeiture, but a Federal District Court held in 1912 that only Congress can declare a forfeiture. 32/ Subsequently, in 1922, Congress passed a statute which provides, inter alia, that a declaration of forfeiture or abandonment be made by Congress or the courts. 33/ Finally, the Bureau of Land Management takes the position that rights of way may be canceled by contest proceedings. 34/

3. Contemporary Problems

a. The Nature of the Interest Granted the Railroads

The nature of the respective interests of the railroads and the United States in a right-of-way granted for railroad purposes is greatly confused because of conflicting judicial decisions, Congressional enactments, and railroad practice.

The United States Supreme Court has interpreted the interest granted under the special grants of rights-of-way to railroads as a present grant of a fee interest, subject to the conditions stated in the act and to those necessarily implied, such as that the road be used for railroad purposes. 35/ The interest of the United States is in the nature of a possibility of reverter should the company cease to use or retain the land for the purpose for which it was granted. Because the railroad's interest is that of a limited fee, the railroad cannot alienate any part of its roadway so as to interfere with the full exercise of the franchise granted, the United States cannot convey rights in the land forming the right-of-way — the grant of the right-of-way, the filing of a map of definite location, and the construction of the railroad taking the land forming the right-of-way out of the category of public lands subject to preemption and sale — and rights in the land forming the right-of-way cannot be obtained by adverse possession. 36/

Despite these strictures, the practice of the Bureau of Land Management has been to issue patents to sections of land that contain railroad rights-of-way for the entire tract, including the right-of-way, and the railroads have frequently deeded the land forming their rights-of-way to third parties.

Until 1915, the General Railroad Right-of-Way Act of 1875 38/ was administratively interpreted as providing for the grant of an easement only. 39/ In 1915, the United States Supreme Court handed down its decision in *Rio Grande Western Ry. v. Stringham* 40/ holding that the 1875 Act granted a fee simple determinable. Under the Stringham interpretation, a right-of-way granted under the 1875 Act was treated similarly to rights-of-way granted under the special grants: the railroad obtained a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purposes for which it was granted; and a subsequent patent of the subdivision traversed by the right-of-way would not operate to convey to the patentee the land within the limits of the right-of-way. 41/

The United States Supreme Court reconsidered the nature of the interest granted to the railroad under the 1875 Act in *Great Northern Ry. v. United States*, decided in 1942. 42/ The United States instituted the suit to enjoin the Great Northern Railway from drilling for or removing minerals from the land underlying a right-of-way granted under the 1875 Act. The court considered the language of the Act, especially that of Section 4 which provides that after the railroad obtains the right-of-way, "... all such lands over which such right-of-way shall pass shall be disposed of subject to such right-of-way..." 43/ It then considered the legislative history of the Act, and the history of the times, marking the passage of the 1875 Act as representing a change in Congressional attitude from the special grant statutes giving bonuses to the railroad to a grant in 1875 of only what was strictly needed by the railroad. Finally, it considered the contemporaneous administrative construction placed on the Act as granting an easement only, and the construction placed by Congress in certain subsequent enactments, for example, the Act of June 26, 1906. 44/ The court concluded that the 1875 Act conveyed an easement only, not a limited fee, and that since the railroad had only an easement, it did not have a right to the underlying oil and minerals. Cases interpreting the rights-of-way granted under the special grants as limited fees were distinguished. The court stated that there was little reason to suppose that when Congress made outright grants to a railroad of alternate sections of public lands along the right-of-way, it intended to give only an easement in the right-of-way granted in the same act; there was no provision in any of the special grant statutes comparable to Section 4 of the 1875 Act; and none of the cases involved the problem of rights to subsurface oil and minerals.

Current Department of Interior regulations to the 1875 Act express the easement theory articulated in Great Northern. They provide that a railroad company obtains a right to use the land for railroad purposes so long as the use continues. The United States, the underlying fee owner at the time of the grant, owns the land in fee subject to the railroad right-of-way. If the Government subsequently transfers its fee interest and patents the land, the patentee takes title subject to the railroad right-of-way. 45/

The adoption of an easement theory creates some difficulty in the application of certain Congressional enactments to post-1871 grants. Under a limited fee theory, upon abandonment or forfeiture of the railroad right-of-way, the fee reverts to the United States, leaving long narrow strips of vacant public domain land. To avoid this, and acting on the assumption that railroad rights-of-way were held as estates in fee simple determinable rather than as easements, 46/ Congress passed the Act of March 8, 1922 47/ which provides that whenever public lands have been granted to a railroad for use as a right-of-way for its railroad or as sites for railroad structures and use and occupancy of the land for such purposes has

or shall cease, whether by forfeiture or by abandonment declared or decreed by the courts or the Congress, then all right, title and interest of the United States in the lands shall vest in the underlying patentee, provided that the transfer shall be subject to and contain reservations in favor of the United States of all oil, gas, and other minerals in the land, with the right to prospect for, mine, and remove the same. The subsequent interpretation of a railroad right-of-way as an easement casts some doubt on the constitutionality of the proviso which reserves to the United States all of the oil, gas and other minerals in the land should it be applied to 1875 grants. A fee simple patent to the land traversed by the right-of-way, issued subsequent to the grant of the railroad easement, would totally extinguish any interest held by the United States in the fee underlying the right-of-way and in the mineral deposits contained therein. A similar problem exists with respect to the 1930 Right-of-Way Leasing Act 48/ which requires that before the Secretary gives an oil and gas lease to the right-of-way owner, the adjoining owners must be notified and permitted to submit a bid. If the railroad has only an easement, the adjacent owners would already own the oil and gas if the lands had been patented without a reservation of mineral rights.

While it is now clear that only an easement is granted under the 1875 Act, the decision of the United States Supreme Court in the United States v. Union Pac. RR. Co. 49/ suggests that a slightly different interpretation from that given in Townsend is now given to the interest granted under the special grants. The action was instituted by the United States to enjoin the Union Pacific from drilling for oil and gas on the right-of-way granted by the Act of July 1, 1862. 50/ Section 2 of the Act grants a right-of-way for the construction of the railroad. Section 3 of the Act grants alternate sections of public land on each side of the road to aid in construction and further provides that "all material lands shall be excepted from the operation of this act..." In construing "mineral lands" in Section 3, the court determines that the term includes "mineral rights" and that Section 3 applies to the entire Act, Section 2 as well as Section 3. The court then concludes that the railroad did not acquire any mineral rights in the land underlying its right-of-way.

With respect to the interpretation given railroad rights-of-way under the special grants as limited fees, the court states: "The most that the 'limited fee' cases decided was that the railroad received all surface rights to the right-of-way and all rights incident to a use for railroad purposes." 51/

The language in Great Northern which distinguishes grants under the 1875 Act from the prior special grants is distinguished on the grounds that in the Great Northern case, there was no occasion to consider the grant of a right-of-way with the reservation of "mineral rights," the court stating:

"The suggestion that a right-of-way may at times be more than an easement was made in an effort to distinguish the earlier 'limited fee' cases." 52/

A lengthy dissent by Mr. Justice Frankfurter, with whom Mr. Justice Burton and Mr. Justice Harlan joined, points up the difference in the court's approach to this case and its treatment of special grant rights-of-way as limited fees in earlier cases. With respect to the court's treatment of the interest granted, the Justice states: "To argue that the 'limited fee' that the long, unbroken line of cases found in the right-of-way grant in the enactments of the 60's granted a fee merely in the surface is to palter with language and with our decisions." With respect to the basis of the decision — the construction of Section 3 — the Justice states that if minerals were found on the patented alternate sections of land, they would belong to the railroad, not the government, and that: "Since this exception does not reserve the right to minerals in land that passed under Section 3 itself, it is difficult to understand how it could have reserved the right to minerals in land that passed as a right-of-way under Section 2."

The question whether the Townsend decision and the line of cases it supports was overruled by Union Pacific is considered in the decision of State of Wyoming v. Udall. 55/ The action was instituted by the State of Wyoming and its oil and gas lessee to review an order and ruling of the Secretary of Interior declaring that the United States owned the oil and gas underlying the railroad's right-of-way. Wyoming claimed title to the oil and gas deposits by virtue of the Act admitting the state to the union and granting to it for school purposes certain sections of land, including those in dispute. 56/ The right-of-way over the land in question was granted under the same Act as that in Union Pacific. 57/

The State of Wyoming and its oil and gas lessee argued that the location of a railroad right-of-way across the tract of public land did not separate the servient estate from the public domain with the result that title to the servient estate passed without express mention in the subsequent grant by the U.S. of the traversed tract; i.e., that an easement theory applies in the case of pre-1871 grants as well as 1875 Act grants. The United States and the railroad argued that the rule applies to post-1871 grants, but not to prior grants. All parties relied on the Union Pacific case.

In considering the effect of the Union Pacific case, the court first rejects the traditional labels applied to the railroad's interest stating: "The concept of 'limited fee' was no doubt applied in Townsend because under

the common law an easement was an incorporeal hereditament which did not give an exclusive right of possession. With the expansion of the meaning of easement to include, so far as railroads are concerned, a right in perpetuity to exclusive use and possession the need for the 'limited fee' label has disappeared." 58/ The court states the Union Pacific did not overrule Townsend, the narrow holding of Union Pacific being that the railroad did not get title to the underlying oil and gas by virtue of the statutory grant in 1862. The court then applies the mineral land exception of Section 3 of the 1862 Act, as interpreted in Union Pacific, to reach its result. The 1864 amendment to the 1862 Act excludes coal and iron land from the mineral land exception of Section 3. Thus the railroad obtained the right to explore for, develop and mine underlying coal and iron. The court states that this constitutes a disposal of iron and coal land in the section traversed by the right-of-way and concludes that, by the terms of Section 4 of the Enabling Act, the prior disposition serves to exclude the right-of-way from the grant of school sections. The effect of this conclusion is that title to the servient estate did not pass with the conveyance of the encumbered tract. It remained in the United States, and the United States retained its rights in the ownership of the underlying oil and gas, not granted to the railroad. Certiorari was denied by the United States Supreme Court on appeal from the circuit court.

b. Abandonment and Forfeiture

No general authority exists permitting the railroad to alienate a portion or all of the lands within its right-of-way, except as provided in the following statutes. The Act of May 25, 1920, 59/ authorizes the railroad to convey any portion of the right-of-way received by grant from Congress to a State, county, or municipality to be used as a public highway or street. Similarly, the Act of Nov. 9, 1921, 60/ authorizes a railroad company to convey any part of its right-of-way acquired by grant from Congress to the highway department of a State or its nominee. However, railroads have treated their interests as if owned in fee and have conveyed their rights-of-way to third parties. Similarly, railroads have leased their rights-of-way to third parties for railroad-related and nonrailroad purposes. In both cases, the question is raised whether the conveyance or lease constitutes an abandonment or forfeiture of the railroad's right-of-way.

The railroad grant is subject to the implied condition that the right-of-way be used for railroad purposes. However, it is not clear what constitutes nonuse for railroad purposes and what actions, beyond nonuse, are required to constitute an abandonment or forfeiture.

There is a dearth of litigation respecting what are railroad purposes within the meaning of Congressional grants of rights-of-way for railroad purposes. It is unclear whether a grant of a right-of-way for railroad purposes means a grant for railroad purposes only or for any use which is not inconsistent with railroad purposes. Most cases seem to implicitly adopt the latter interpretation. For example, state courts have held that the railroad may use or permit the use of its railroad for commercial purposes so long as the use does not interfere with the railroad's use for railroad purposes. 61/ And it has been held that use of a railroad right-of-way for nonrailroad purposes under a short term lease did not give rise to a forfeiture on the theory that the land is always available on short notice for railroad purposes. 62/

Nonuse alone does not constitute an abandonment. Abandonment is largely a question of intent; it must be established by acts which clearly constitute nonuse and a purpose on the part of the railroad to give up the use. 63/ It may always be argued that in leasing, even for uses inconsistent with a use for railroad purposes, the railroad did not intend to abandon its right-of-way. On the other hand, the intent to abandon seems indisputable when the railroad actually conveys its interest to another. Nor does misuse alone give rise to a forfeiture. Generally, courts will not declare the forfeiture of an easement if the misuser can be severed from the easement or prohibited by the owner. 64/ And a court may easily effect compliance with the terms of the grant when it determines that the uses entered upon or permitted by the railroad are inconsistent with a use for railroad purposes by enjoining the improper use.

Apart from the question of what actions must be shown to prove abandonment or forfeiture is the question of who may declare an abandonment or forfeiture. The language of the Act of March 8, 1922, 65/ suggests that only the courts or Congress may do so. However, the Act, for constitutional and historical reasons, may be interpreted as applying only to rights-of-way acquired under the special grants. While the Department of the Interior would perhaps be the logical body to police railroad rights-of-way and declare abandonments and forfeitures, the BLM takes the position that there is no possibility of abandonment until the courts or Congress has declared the interest abandoned. 66/

Legislation governing the disposition of abandoned or forfeited railroad rights-of-way — defining who is to control disposition, what constitutes an abandonment or forfeiture, and who may declare abandonment or forfeiture — are badly needed. The title of railroad conveyees remains in doubt until Congress confirms the grant or until forfeiture or abandonment is declared by the courts or Congress; the investment of railroad lessees remains in jeopardy if the act of leasing is ultimately considered an abandonment or forfeiture, and the interests of the United States cannot be protected so long as those interests remain undefined.

C. Private Roads

Until 1895 the Government had made no provision for private, industrial or commercial rights-of-way over public land. The Act of January 21, 1895, 67/ authorizes the Secretary of the Interior to permit the use of rights-of-way over public lands not within the limits of any national forest, park, military, or Indian reservation for tramroads to the extent of 50 feet on each side of the centerline of the tramroad. Within the meaning of the statute, tramroads are defined as tramways, railroads and motor truck roads to be used in connection with mining, quarrying, logging and the manufacturing of lumber. 68/

Any citizen or association of citizens engaged in the business of mining or quarrying or cutting timber and manufacturing lumber is eligible to apply under this authority. 69/ However, the Bureau of Land Management may reject an application for a tramroad right of way where its allowance would be detrimental to a state's highway program which is for the benefit of the general public. 70/

Rights of way obtained under this authority are subject to the terms and conditions which apply to rights of way in general. 71/ The applicant may be required to execute a bond in an amount of not less than \$500/mile or fraction thereof and conditioned on compliance with these terms and conditions and other provisions governing the application for, approval of and cancellation of rights of way in general. 72/ The charge for the right of way is based on its fair market value, but may not be less than \$25. 73/

In addition to granting rights of way, the Bureau of Land Management may grant "temporary rights of way" under the authority of 43 USC 956. Such rights of way may be for a period of not more than six months 74/ and may be extended once for not more than six months. 75/ No special application need be filed. 76/ It is the policy of the Bureau of Land Management to grant such rights of way promptly and with as few restrictions as possible. 77/ The charge for use of lands under these provisions is fifty cents per mile or fraction thereof per month or fraction thereof. 78/ Use and occupancy for the purpose of removing mining and timber products acquired from the United States under contract or permit is exempted from the rent provisions. 79/

Other than 43 U.S.C. § 956 (1966), the only specific statute authorizing the construction of private roads over public lands is 16 U.S.C. § 478 (1964) which authorizes the Forest Service to issue permits to actual settlers within the boundaries of a National forest for the purpose of constructing wagon roads necessary to reach and utilize their property. .

With respect to such permits, an Opinion of the Attorney General states that when granting a permit to an actual settler to construct a wagon road across a National forest or when granting a permit to a person who is not an actual settler to use or construct roads across National forests, the Secretary of Agriculture has the discretionary authority to require that the applicant grant a similar reciprocal right to the United States to cross his property in order to reach National forest lands. 80/ Such a provision would alleviate the problem of access rights to the public domain when permission to construct a private road is granted.

D. Shoring Up Legislation

After 1888 a series of laws were passed which extend the right of way authorizations for highway, railroad and tramroad uses over certain classes of land which has been excluded from the operation of 43 U.S.C. § 932 (1964), 43 U.S.C. § 934 (1964) and 43 U.S.C. § 956 (1964). 25 U.S.C. § 312 (1964) provides for rights of way for railroads over Indian land. The Bureau of Indian Affairs has jurisdiction over applications for rights of way over Indian lands, and the regulations contained in 25 C.F.R. § 161 apply. 81/ Since Indian reservations are the subject of another study, this statute will not be discussed in detail here. 43 U.S.C. § 958 (1964) and 16 U.S.C. § 525 (1964) authorize the Secretary of the Interior to grant rights of way for wagon roads, highways, and railroads over reservoir sites and National forest lands, respectively. The general Department of the Interior regulations governing rights of way in general 82/ and rights of way for railroads 83/ and tramroads 84/ specifically apply to these uses over reservoir sites and National forests. Only those provisions which are unique to rights of way over the sites in question, as opposed to the public lands in general, will be considered here. Additionally, 16 U.S.C. § 533 (1964) authorizes the Secretary of Agriculture to grant permanent and temporary easements for roads over lands administered by the Forest Service. Finally, 10 U.S.C. § 2668 (1964) provides for rights of way for a wide variety of purposes over military reservations. This is a statute of broad applicability and is discussed also in Chapter One. 85/

25 U.S.C. § 312 (1964) authorizes rights of way grants for railroad, telegraph or telephone lines over Indian reservation or land reserved for an Indian agency or land allotted to individual Indians under a law or treaty which does not give the Indian the power of alienation. This statute fills a gap in the General Railroad Grant Act, 43 U.S.C. § 934 (1964), which excepts from its application Indian reservations. Rights of way through Indian land are to be fifty feet wide, unless heavy cuts and fills require 100 feet. Adjacent grounds for stations, side tracts and turnouts are not to exceed 200 feet wide by 3,000 feet long; and only one station is permitted within any ten miles of tract. 86/ The

railroad must file a map and pay compensation for the right-of-way, and the Secretary of Interior may appoint a referee to determine the fair amount of compensation. 87/ Finally, construction must be completed within three years, with a two-year extension available in some cases, or the railroad forfeits its rights. 88/

43 U.S.C. § 958 (1964) and 43 U.S.C. § 665 (1964), which are identical statutes, authorize the Secretary of the Interior to approve rights-of-way over reservoir sites for railroads and other purposes including highways and wagon roads when the Secretary determines that the public interest will not be injuriously affected thereby. Department of the Interior regulations provide that when a right of way is sought over land which is withdrawn or reserved for use of another Federal agency, the Bureau of Land Management is required to clear the application with such agency. 89/ The Bureau of Reclamation classifies rights of way for roads as "easements" and would presumably condition its approval on the Bureau of Land Management's including the terms and conditions which are normally placed on Bureau of Reclamation grants of easements. These include the following limitations: terms and conditions be imposed which are deemed adequate to protect the particular lands administered and compatible with the purposes for which the lands were withdrawn as determined by the contracting officer; that the lands be made available only to citizens of the United States, domestic corporations, governmental or quasi-governmental entities which have no known debt due the United States for which the party is delinquent; and that, except for a perpetual easement, an instrument be limited to fifty years or less. No charge is required if a corporation, such as a railroad, offers reciprocal right-of-way privileges. 90/

16 U.S.C. § 525 (1964) authorizes the Secretary of the Interior to approve rights of way for wagon roads, railroads or highways across any National forest when in his judgment the public interest is not injuriously affected thereby.

Department of the Interior regulations provide that every applicant for a right of way within a National forest agree to such stipulations as the Forest Service may require. 91/ Standard railroad stipulations, for example, include the following requirements: agreement to maintain the right of way in conformity with standards acceptable to the forest officer; fire control; installation of locomotive signals; building new roads to replace those destroyed in construction; maintaining suitable crossing for such roads that intersect the right of way; permission to the United States to use and occupy without charge and without consent of the railroad any part of such right of way across the lands of the United States within the boundaries of the National forests not actually occupied by the railroad; and permission to officers and employees of the United States to enjoy free and unrestricted access in, through, and across the right of way when not inconsistent with the enjoyment of such right of way by the applicant. 92/

Department of the Interior regulations also provide that the Forest Service may require the applicant to execute a bond for the protection of forest lands. 93/ A court of equity may enjoin railroad construction in a National forest unless the bond to protect the Government is received. 94/

Additionally, the Forest Service itself may grant easements over Section 10 lands for road purposes. The Act of October 13, 1964, authorizes the Secretary of Agriculture to grant permanent or temporary easements for specified periods or otherwise for road rights of way over National forest lands and other lands administered by the Forest Service and over other related lands over which the Secretary has rights. 95/ The Secretary may require the user or users of a road under the control of the Forest Service to maintain the road in a satisfactory condition commensurate with its particular use requirements and to reconstruct the road when reconstruction is determined to be necessary to accommodate such use or, if this is not practical, to deposit funds to provide for such maintenance and reconstruction. 96/ The easement may be terminated by consent of the owner, by condemnation, or by cancellation if, after a five-year period of nonuse, the Secretary finds the owner has abandoned it. However, before cancelling for nonuse, the Secretary must notify the owner of his determination to cancel and afford him a hearing. 97/ Copies of all instruments affecting permanent interests of land are to be recorded in the county where the lands are located; copies of such instruments affecting interests in land reserved from the public domain are to be furnished to the Secretary of the Interior. 98/

Applications for permanent or temporary easements will be approved only for those applicants who have conveyed or provided appropriate easements over roads, assignable easements and lands owned or controlled by them to the United States and its assigns and who have constructed or will, as scheduled by agreement, construct their proportionate share of the road or road system of which the segments described in the application are parts. 99/ Easements may be granted to states or local subdivisions when the roads to be constructed will serve Forest Service lands and are or will become part of the road system maintained by the State or local subdivision for general public use. However, an easement will not be granted under this authority if a right of way might be obtained under 23 U.S.C. § 317 (1964). 100/ Holders of rights of way obtained under 16 U.S.C. § 525 (1964) and holders of permits under 16 U.S.C. § 478 (1964) may, upon application, replace such grants with easements issued under this authority. 101/

10 U.S.C. § 2668 (1964) provides that if the Secretary of a military department finds it is not against the public interest he may grant, under the terms he thinks advisable, an easement for rights-of-way

over public lands withdrawn or reserved for use of his department for railroad tracts, roads, or "any other purpose." The right of way can be terminated for nonuse for a period of two years, abandonment, or breach of its terms. Copies of the instruments granting the easements are to be furnished to the Secretary of the Interior.

E. Federal Aid Highways

Title 23 of the United States Code contains two statutes which provide for the conveyance of rights of way over Section 10 lands to State highway departments for Federal aid highways. 102/

23 U.S.C. § 107(d) (1964) provides that whenever rights of way, including control of access, in the Interstate System are required over lands or interests in lands owned by the United States, the Secretary of Commerce 103/ may make such arrangements with the agency having jurisdiction over the lands as may be necessary to give the State or other person constructing the project adequate rights of way and control of access thereto from adjoining lands.

23 U.S.C. § 317 (1964) provides that if the Secretary of Commerce 104/ determines that any part of the lands or interests in lands owned by the United States is reasonably necessary for the right of way of any highway constructed on the Federal aid primary, secondary or Interstate System or as a source of materials for the construction or maintenance of any such highway adjacent to such lands or interests in lands, a map showing the portion of such land desired may be drawn so that public domain lands may be identified and the land conveyed to the appropriate State highway department. If within four months the Secretary of the department supervising the requested public land has not certified to the Secretary of Transportation that the proposed appropriation is contrary to the public interest or is in conflict with the purpose of the reservation, the land may be transferred to the State highway department or its nominee. The transfer is subject to the conditions imposed by the supervising department as necessary to protect the reserve. If the need for it ceases, the land will revert to the original controlling department. Such reversion is handled by the Department of Transportation on notice from the State Highway Department.

Except where an application involves lands wholly within an Indian reservation, applications for lands under the jurisdiction of the Department of the Interior are to be filed with the Bureau of Land Management. 105/ Prior to filing, an applicant is expected to consult with local officials of the Bureau of Land Management to determine

whether or not the use of the lands for right of way purposes 106/ is consistent with the management program and to agree on such measures as may be necessary to maintain program values. 107/ A copy of the application and map filed is to be forwarded to the Bureau of Public Roads for a determination of whether the lands are reasonably necessary for the purposes authorized in Title 23. 108/ After a favorable Bureau of Public Roads determination, the Bureau of Land Management is to notify the applicant and the Bureau of Public Roads officer either that approval of the application would be contrary to the public interest or inconsistent with the purposes of reserved lands or that the right of way will be granted, subject to the terms and conditions contained in the notice. 109/

Grants of rights of way are to be based upon considerations of adequate protection and utilization of Federal land. 110/ The conditions imposed on grants of rights of way in general apply. 111/ However, the applicant may formally request that certain conditions otherwise applicable be dispensed with; such a request may be granted upon a finding that it is in conformity with the public interest and the purposes of Title 23. 112/ It is the policy of the Bureau of Land Management that conditions be kept to the minimum necessary to protect significant resource values: the conservation benefits should be weighed against the resulting costs to the highway program. 113/

Grants of rights of way under this authority may include a release to the State or its nominee of all rights of the United States as owner of underlying and abutting lands to cross over or gain access to the highway from its lands crossed by or abutting the right of way, subject to such terms and conditions and for such duration as the Bureau of Land Management deems appropriate. 114/ However, where it is essential to retain access to the highway for the United States or its licensees, lessees or permittees at specific points or for specific purposes or both, the right of access will be made a condition of the grant. 115/ In general, no application need be filed for a right of way for usual highway facilities. 116/

No charge is made for the rights of way conveyed under this authority. 117/

II. AIRPORTS

A. Use and Occupancy

The Act of May 24, 1928, 118/ authorizes the Secretary of the Interior 119/ in his discretion to lease for use as a public airport any unreserved and unappropriated contiguous public lands, whether surveyed or not. 120/ The public lands will be considered contiguous if they adjoin lands to be included within the airport, irrespective of the title to such lands. Two or more tracts of public lands which do not adjoin each other but which do adjoin other lands owned or controlled by the applicant for the airport are "contiguous" for the purposes of airport leasing. 121/ The policy of the Bureau of Land Management is to consider airport use among the highest of land uses and, upon recommendation of the Federal Aviation Administration, to grant airport leases unless very important considerations dictate otherwise. If the specific lands applied for are reserved and thus not subject to lease, the policy of the Bureau of Land Management is to inquire of the administering agency whether that agency has authority to issue an airport lease to the applicant, and, if not, whether it is agreeable to the modification of the withdrawal order and, when possible, to permit issuance of the lease. 122/

Applications under the Act may be made by any citizen of the United States; any group or association of citizens of the United States; any corporation, organized under the laws of the United States or of any State, authorized to conduct business in the State in which the land involved is located; and any State or any political subdivisions or instrumentality thereof, including counties and municipalities. 123/

Upon receipt of an application the Adjudication Officer of the Bureau of Land Management will prepare a status report and collect a service charge if required. 124/ He will then examine the application and this evidence for adequacy of the land description, qualifications of the applicant, acreage limitations of the lease, and the results of the status report showing whether the lands are subject to lease. 125/

After examining the application and the status report, the Adjudication Officer will request reports from the Geological Survey, the Federal Aviation Administration, and the Classification Officer. 126/ The Classification Officer will prepare a report containing the characteristics of the land, mining claims observed on the land, any other conflicting or adverse use observed on the ground, a list of items, if any, that should be reserved to the United States, any special stipulations to be included in the lease, the proper term of years for the lease, and

whether the lands applied for are contiguous. 127/ The filing of a valid application segregates the affected lands to the extent that all conflicting later-filed applications will be suspended pending final action on the lease application. 128/

Pending receipt of the reports from the Geological Survey, the Federal Aviation Administration, and the Classification Officer, the Adjudication Officer will call upon the applicant to take curative action only on major defects in the application, and if incurable, the application will be rejected. 129/ After receiving all reports, the Adjudication Officer will correct any remaining defects on the record. If the disposal of conflicts is favorable to the applicant and the land is or should be available to him, the Adjudication Officer will issue a decision transmitting a lease form to the applicant for execution, including in the form any reservations or stipulations required by the status of the lands, the Classification Officer, or the Federal Aviation Administration. He will also call for payments of advance rental, which shall be the minimum rental specified by the regulations. 130/

The maximum area of land authorized for lease as an airport is 2,560 acres. Although the Act states that the lease shall not exceed a period of 20 years, the Bureau of Land Management policy is to grant a lease of longer duration if there are strong reasons for doing so. 131/ The lease may be renewed after the initial period, but to obtain the renewal, the lessee must take the same steps he took to apply for the lease originally. Applications for renewal will be processed essentially in the same manner as original applications, except unnecessary steps will be avoided. 132/

Every lessee under the Act must pay an annual rental of not less than \$10.00 for an area not exceeding 640 acres, and not less than \$5.00 for each additional 640 acres or fraction thereof. The rental terms shall be subject to reconsideration and revision at three-year intervals, when the Adjudication Officer will refer the case record to the Classification Officer to determine the proper rental for the next three-year period and will take appropriate action on that officer's decision. Where the lessee is a governmental agency or non-profit organization and where the three-year average annual gross receipts exceed \$5,000, the new annual rental will be 1 percent of the three-year average of the fair rental value of the lands as of the beginning of the next three-year interval, adjusted as provided in V Bureau of Land Management 3.3.7 or the original rental, whichever is lower. If the lessee is an individual or an organization organized for profit, the new rental will be computed as above except that the fair rental value will not be adjusted. 133/

Rental on renewals will be based on the last previous three-year rental period and be computed in the above fashion. 134/

The lessee is bound to establish and maintain a public airport on the premises and to keep it equipped and maintained at all times in accordance with the requirements made by the Federal Aviation Administration. The lessee is also required to pay the rental in advance annually. Failure to meet any of these provisions may, in the discretion of the Adjudication Officer, result in a cancellation of the lease. 135/ The lessee is also required to complete the construction of facilities for service, fuel, and other supplies necessary to make the land available for public use as an airport within six months from the execution of the lease. 136/

The Act provides that all departments and agencies of the United States operating aircraft shall have free and unrestricted use of the airports; with the approval of the lessor, any department or agency shall have the right to erect such structures and improvements as are deemed advisable, including facilities for maintaining supplies of fuel, oil, and other materials for operating aircraft. Upon receipt of a request from a Federal department or agency for permission to construct structures or improvements on the leased area, the Adjudication Officer will notify the lessee of the request, asking for his comments, and will ask the Federal Aviation Administration for its recommendations. If the Federal Aviation Administration recommends approval and the lessee objects, the Adjudication Officer will consider the objection as a protest and will refer the matter to the Classification Officer. If he concludes the approval should be granted, the Adjudication Officer will dismiss the protest, giving the lessee a right to appeal. If the Classification Officer concludes that the approval should not be granted, the Adjudication Officer will advise the Federal department or agency of the objections approval. Where approval is indicated, the Adjudication Officer will notify the Federal department or agency, with a copy to the lessee. 137/

The lessee is bound not to allow the use of the premises for unlawful purposes or for any purpose not in harmony with proper use as an airport, and not to discriminate against any employee or job applicant because of race, religion, color or national origin. The lessee is free to establish its own regulations governing the use of the airport, but must submit to the administrator of the Federal Aviation Administration a copy of those regulations. 138/ The Act authorizes the Secretary of Defense to assume full control of the airport whenever the President may deem it necessary for military purposes. 139/

No lessee may assign or sublet the lease without the consent of the lessor, and the lessee must submit for consideration all assignments made, subject to the lessor's approval. Upon receipt of a copy of a proposed assignment or sublease, the Adjudication Officer will take such action as may be necessary to determine whether the assignee or sublessee is qualified to take a lease under the law and regulations and will ask the Federal Aviation Administration for its recommendations about approval of the assignment or sublease. If the Federal Aviation Administration recommends approval, the Adjudication Officer will issue an appropriate decision. If the Federal Aviation Administration recommends disapproval, the Adjudication Officer will issue a decision denying approval, giving the reasons for objection stated by the Federal Aviation Administration. 140/

Authorized representatives of the Bureau of Land Management or of the Federal Aviation Administration shall at any time have the right to enter the leased premises for the purpose of inspection and shall have free access to the books containing records of operations under authority of the lease. At five-year intervals the Adjudication Officer will write to the Federal Aviation Administration for a report on the use of the lands by the lessee. If the Federal Aviation Administration reports noncompliance, the Adjudication Officer will refer the matter to the Classification Officer and take further action as that officer recommends. Unless he has special reason to do so, the Classification Officer will not schedule investigations to check on the lessee's compliance with the lease terms and conditions, but if the Federal Aviation Administration reports violation of the lease terms and conditions, the Classification Officer will make such supplemental investigations as may be necessary and will advise the Adjudication Officer to take such action as is appropriate in the circumstances. 141/

B. Disposal

1. Federal Airport Act of 1946

The Federal Airport Act of 1946 authorizes the Administrator of the Federal Aviation Agency whenever he determines that the use of the lands owned or controlled by the United States is reasonably necessary for carrying out a project under the Act 142/ or for the operation of any public airport, to file with the head of the department or agency having control over the lands a request that such property be conveyed to the public agency sponsoring the project or owning or controlling the airport. 143/

Any State, the District of Columbia, any agency thereof, any municipality or other political subdivision, or any tax-supported organization may request a conveyance of property under the Act if: it plans to use the property in connection with developing, improving, or constructing a public airport; it has legal authority to accept the conveyance and to engage in the kind of development, improvement, or construction necessary to benefit from the conveyance; and it has sufficient funds to pay for the development, improvement or construction contemplated and to operate and maintain the airport. 144/

The Administrator of the Federal Aviation Administration reviews the requests made. If he determines that the public agency requesting the conveyance is eligible and the conveyance is proper, he then files a request for conveyance with the head of the department or agency having control of the property. 145/

In the case of public or Federally owned lands, the Administrator's request is filed with the Secretary of Interior. 146/ The Secretary shall determine only whether the request conveyance is consistent with the needs of the department or any agency of the department, and shall notify the Administrator of his determination within four months after receiving the Administrator's request. 147/ Failure to respond within the four-month period constitutes a determination that the requested conveyance is consistent with the department's needs. 148/ Upon a determination that the requested conveyance is consistent with the department's needs, the Secretary, with the approval of the Attorney General, 149/ shall execute the requested conveyance. 150/

Conveyance is made without consideration but subject to the condition that the property conveyed shall automatically revert to the United States in the event that the lands are not developed within five years from the date of conveyance or have ceased to be used for airport purposes for a period of six months. 151/

Additionally, provision is made for covenants, to run with the land as follows: that the grantee will use the property conveyed for airport purposes; that use of the airport and its facilities be on reasonable terms and without discrimination; that the grantee will not grant any exclusive right at the airport forbidden by § 308(a) of the Federal Aviation Act of 1958; 152/ that the grantee will not grant to any person, firm, or corporation, exclusive rights at the airport or at any airport it owns or controls unless authorized to do so by the Federal Aviation Administration Administrator; that any later transfer of the property conveyed will be subject to the covenants and conditions contained in

the instrument of conveyance; and that if any covenant or condition in the instrument of conveyance is breached, the Federal Aviation Administration may immediately enter and repossess title on behalf of the United States. 153/

Additional covenants, terms, and conditions may be imposed by the Secretary of the Interior for the protection of the Department; and any conveyance by him will be made subject to valid existing rights of record and to those disclosed as a result of publication. 154/

2. Surplus Property Act of 1944

The Surplus Property Act of 1944, 155/ as carried over into the Federal Property and Administrative Services Act of 1949 156/ authorizes conveyances of surplus real property for airport purposes. Pursuant to this Act, the authorized disposal agency, with the approval of General Service Administration, may convey to any State, political subdivision, municipality or tax-supported institution any surplus real property which in the determination of the Administrator of the Federal Aviation Administration is essential, suitable, or desirable for the development, improvement, operation, or maintenance of a public airport. 157/

Surplus property is disposed of under this authority without monetary consideration. 158/

All property is conveyed subject to the following terms and conditions: no property shall be used, leased, sold, salvaged, or disposed of by the grantee for other than airport purposes without the consent of the Administrator of the Federal Aviation Administration; all property shall be used and maintained for the use and benefit of the public, without unjust discrimination: no exclusive right for the use of the airport at which the property disposed of is located shall be given; during any National emergency, the United States shall have the right to make exclusive or nonexclusive use, without charge, of the airport at which the property disposed of is located; the United States shall at all times have the right to make nonexclusive use of the landing area of the airport at which the property disposed of is located or used, without charge; the transferee shall release the United States from any liability it may be under for damages under any lease or other agreement covering the use by the United States of any airport owned, controlled or operated by the transferee in connection with which the property disposed of was located or used; and in the event that any of the terms, conditions, reservations, and restrictions upon which the property was disposed of are not met, all or any part of the property

disposed of shall, at the option of the United States, revert to the United States in its then existing condition. 159/

The Administrator of the Federal Aviation Administration has the sole responsibility for enforcing compliance with the terms and conditions of disposal.

III. RELATED LAWS

A. Roads for Forest Development

The Federal highway program includes provision for roads to serve Federally owned lands. The policies and purposes for these roads are considerably different from those underlying the Federal-aid system. 160/ The objective is to efficiently administer Government lands.

For example, except for forest highways, where funds are allocated among the States according to the area and value of land owned by the United States within the National forests in the State, as certified by the Secretary of Agriculture, 161/ sums for forest development roads and trails and public lands highways are allocated on the basis of need. 162/ As to forest development roads and trails, the need is determined by considering existing transportation facilities, value of timber or other resources served, relative fire danger, and comparative difficulties of construction. 163/ Need is not defined by the statute for public lands highways and the States are required to apply for the funds, which are preferentially available when the public lands highways are also a Federal-aid highway. 164/

Under the Federal-aid system, funds are generally available only for construction, whereas funds for maintenance are also provided for forest highways 165/ forest development roads and trails, and 166/ public lands highways. 167/ In addition to construction funds, funds for improvement are available for park roads and trails, 168/ parkways 169/ and public lands development roads and trails. 170/

Under the Federal-aid system, the States are requisite to road construction, because the funds are used to stimulate state construction. However, as to forest highways, while the Secretary may enter into construction contracts with States and their subdivisions 171/ and may cooperate with them, it is not necessary to do so 172/ and the Secretary under some circumstances can construct the roads with his own personnel. 173/ Similar provisions apply to forest development roads and trails under authority given to the Secretary of Agriculture. 174/ As to public lands highways, the Secretary is authorized to cooperate with State highway departments concerning survey, construction and maintenance. 175/

Other kinds of roads are the sole concern of the Federal Government, though more than one Federal agency may be concerned. For example, park roads and trails are administered in conformity with regulations

jointly approved by the Secretary of the Department of Transportation and the Secretary of the Interior 176/ and the same provisions apply to parkways. 177/ In addition, parkways upon public lands, National forests and other Federal reservations shall be provided for by agreement with other Federal departments having jurisdiction over the land. 178/ Public lands development roads and trails require the approval of the Secretary. 179/

Roads that can be developed in cooperation with the state and its subdivisions often also involve more than one Federal agency. For example, forest highways are subject to joint regulations of the Secretary and the Secretary of Agriculture 180/ and the available funds are transferred to cover the administrative expenses of the Forest Service in connection with forest highways. 181/ The Secretary is authorized to cooperate with the Secretary of the Department having jurisdiction over the particular lands involved as to survey, construction and maintenance of public lands highways. 182/

For many types of roads involved in this discussion, funds available for roads also can be expended for adjacent vehicular parking areas and for sanitary, water, and fire control facilities. This type of provision applies to forest highways, 183/ forest development roads and trails, 184/ public lands highways 185/ and public lands development roads and trails. 186/

B. Airports for Forest Development

In another administrative Government land use, 16 U.S.C. § 7a (1964) authorizes the Secretary of Interior to acquire, establish, construct, improve, operate, regulate and protect airports in the continental United States in or in close proximity to National recreational areas when such is necessary to the proper performance of the functions of the Department of the Interior. Federal Aviation Administration standards, rules and regulations will apply in the operation of such airports. § 7b authorizes the acquisition of lands and the entering into contracts for operation, construction and maintenance. Insofar as land herein involved might be acquired by transfer or otherwise from another Federal agency or already be within the Department of the Interior jurisdiction, this statute would apply to airport use of Federal land, construction and operation being the aspects acquired from private sources.

The statute did not address itself to eligibility, acreage restrictions, price, other conditions, terms or restrictions.

C. National Park Approach Roads

Another statute dealing essentially with administration and designation of lands within the Government jurisdiction deals with National park approach roads. Pursuant to 16 U.S.C. § 8a (1964), whenever the Secretary of the Interior determines it to be in the public interest he may designate as National park approach roads and as supplementary parts of any of the National parks, roads whose primary value is to carry National park travel and which lead across lands wholly or 90 percent owned by the Government and which will connect the highways within a National park with a convenient point on or leading to the Federal 7 percent highway system. Under § 8c whenever any approach road is proposed under § 8a across or within any National forest, the Secretary of the Interior will secure approval of the Secretary of Agriculture before beginning construction. § 8d stipulates that approach roads to National monuments will be handled similarly. Such approach roads so designated are limited to less than sixty miles in length between park gateway and such point on or leading to the nearest 7 percent system road, or if such road is on the 7 percent system, it is limited to thirty miles. Further, no such road may exceed forty miles within any one county.^{187/} Pursuant to § 8b, \$10,000,000 for each fiscal year 1950, 1951 was allocated for "all such purposes." Annual improvements allocation was set at \$1,500,000.

Pursuant to 16 U.S.C. § 8e, the Secretary of the Interior is authorized to convey to any State, county, municipality or proper agency thereof, all right, title and interest of the United States in Government owned or controlled road leading to any National cemetery, National military park, National historical park, National battlefield park or National historic site administered by the park service. A written "willingness to accept" statement is the only condition or term found in the statute.

Footnotes

1. Flint & P. M. Ry. v. Gordon, 41 Mich. 420, 2 N. W. 648 (1879).
2. 43 C. F. R. § 2234.2-5 (b) (1) (1969); McAllister v. Okanogan County, 51 Wash. 647, 100 P. 146 (1909).
3. 43 C. F. R. § 2234.2-5 (b) (1); Warren v. Chouteau, 82 Mont. 115, 265 P. 676 (1928); Bishop v. Hawlby, 33 Wyo. 271, 238 P. 284 (1925).
4. Tennessee & C. R. R. v. Taylor, 102 Ala. 224, 14 So. 379 (1893).
5. Oregon S. L. R. R. v. Murray City, 2 Utah 2d 427, 277 P. 2d 798 (1954).
6. Sullivan v. Condas, 76 Utah 585, 290 P. 954 (1930).
7. 43 C. F. R. § 2234.2-5(c)(1) (1969).
8. Id. § 2234.2-5(b)(1).
9. Id. § 2234.2-5(c)(1), See id. § 2234.1-2.
10. Id. § 2234.2-5(c)(1).
11. 43 U. S. C. § 1181a (1964).
12. 43 C. F. R. §§ 2234.2-5(c)(2)-(3) (1969).
13. Id. §§ 2234.1-6, 2234.2-5.
14. Id. §§ 2234.1-3(c)(2)-(5), (9), (11), 2234.2-5(b)(2).
15. Id. § 2234.12-5(b)(2).
16. Statement of Bureau of Land Management Director, Karl S. Landstrom, Hearings on H. R. 6630, 6945, 3229, 3346, 5745, 6161, 7436, 7550 Before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs, 87th Cong., 1st Sess., ser. 9 at 23 (1961) (hereinafter cited as Hearings on H. R. 6630).

17. 12 Stat. 489, as amended, Act of July 2, 1864, 13 Stat. 356.
18. 43 U.S.C. §§ 934-939 (1964).
19. Id. § 938.
20. See Shoring Up Legislation, infra.
21. 43 U.S.C. § 934 (1964).
22. United States v. Denver & R.G. Ry., 190 F. 825 (C.C.D. Colo. 1911).
23. Atchison, T. & S.F. Ry., Los Angeles 0164638 (Jan. 27, 1964).
24. 43 U.S.C. § 937 (1964).
25. Washington & I. R. R. v. Coeur D'Alene Ry. & N., 52F. 765 (C.C.D. Idaho 1892).
26. 43 C.F.R. §§ 2234.2-2(e)-(f) (1969).
27. 43 U.S.C. § 937 (1964).
28. 5 B.L.M. Manual § 3.8.75 (Release 196, Oct. 25, 1960).
29. 43 U.S.C. §§ 904-907 (1964).
30. Id. § 904.
31. Id. § 940.
32. Taggart v. Great Ry., 208 F. 455 (E.D. Wash. 1912).
33. 43 U.S.C. § 912 (1964).
34. 5 B.L.M. Manual § 3.8.50B(3) (Release 264, Oct. 16, 1964); B.L.M. Instruction Memo No. 64-250 (June 30, 1965).

35. *New Mexico v. U. S. Trust Co.*, 172 U.S. 171, 181 (1898);
St. Joseph & Denver City RR Co. v. Baldwin, 103 U.S. 426 (1880).
36. *Northern Pac. Ry. v. Townsend*, 190 U.S. 267 (1903).
37. Statement of Karl S. Landstrom, Director, Bureau of Land Management, Hearings on H.R. 6630 at 28.
38. 43 U.S.C. §§ 934-39 (1964).
39. Right-of-Way Regulations, 14 L.D. 338 (1892); Right-of-Way Regulations, 27 L.D. 663 (1898); Right-of-Way Regulations, 37 L.D. 787 (1909).
40. 239 U.S. 44 (1915).
41. *Id.*, E. A. Crandall, 43 L.D. 556 (1915).
42. 315 U.S. 262 (1942).
43. 43 U.S.C. § 937 (1964).
44. 34 Stat. 482.
45. 43 C.F.R. § 2234.2-2(b) (1969).
46. S. Rep. No. 388, 67th Cong. 2nd Sess. (1922).
47. 43 U.S.C. § 912 (1964).
48. 30 U.S.C. §§ 301-306 (1964).
49. 353 U.S. 112 (1957).
50. 12 Stat. 489.
51. *Id.*, at 119.
52. (emphasis added).
53. *Id.*, at 131.
54. *Id.*, at 133.
55. 379 F2d 635 (10th Cir. 1967), cert. denied 389 U.S. 985.
56. Act of July 10, 1890, ch. 664, 26 Stat. 223.

57. Act of July 1, 1862, 12 Stat. 489, as amended by the Act of July 2, 1864, 13 Stat. 356.
58. 43 U.S.C. § 913 (1964).
60. 23 U.S.C. § 316. (1964).
61. See *City of Long Beach v. Pac. Elec. Ry.*, 44 C2d, 283 P2d 1036 (1955):
62. See *City of Santa Monica v. Jones*, 104 CA2d 463, 232 P2d 55 (1951).
63. *Barnes v. Southern Pac. Co.*, 300 F. 481 (9th Cir. 1924).
64. See *Peon Bowling Recreation Ctr. v. Hot Shoppes, Inc.*, 179 F2d 64 (DC Cir. 1949).
65. 43 U.S.C. § 912 (1964).
66. Statement of Karl Landstrom, supra. n. 37.
67. 43 U.S.C. § 956 (1964).
68. 43 C.F.R. § 2234.2-3(a) (2) (1969).
69. 43 U.S.C. § 956 (1964).
70. Harold L. Pierce, Riverside 04264 (Apr. 12, 1965).
71. 43 C.F.R. § 2234.1-1(a) (1969); See Id. § 2234.1-3(c).
72. Id. § 2234.2-3(9)(1); See Id. §§ 2234.1-1 to -5.
73. Id. §§ 2234.1-1(a), 2234.1-6(a).
74. Id. § 2234.2-3(a)(2)(ii).
75. Id.
76. Id. § 2234(a)(2).
77. 5 Bureau of Land Management Manual § 3.8.5 (Release 196, Oct. 25, 1960).
78. 43 C.F.R. § 2234.2-3(a)(2)(ii) (1969).
79. Id.

80. 42 Op. Att'y Gen. No. 7 (Feb. 1, 1962). The opinion states that the reciprocity requirement could be lawfully applied under 16 U.S.C. § 525 (1964).
81. 43 C.F.R. § 2234.1-2(e) (1969).
82. Id. § 2234.1.
83. Id. § 2234.2. See discussion, supra.
84. Id. § 2234.3. See discussion, supra.
85. See discussion, supra.
86. 25 U.S.C. § 313 (1964).
87. Id. § 314.
88. Id. § 315.
89. 43 C.F.R. § 2234.1-4(a)(e) (1969).
90. Bureau of Reclamations Instructions § 215.4.1 (July 26, 1957).
91. 43 C.F.R. § 2234.1-3(d) (1969).
92. F.S. Handbook § 2751.52 (1958).
93. 43 C.F.R. § 2234.1-3(d) (1969).
94. Chicago, M. & St. P. Ry. v. United States, 244 U.S.C. § 351 (1917).
95. 16 U.S.C. § 533 (1964).
96. Id. § 537.
97. Id. § 534.
98. Id. § 536.
99. 36 C.F.R. § 212.10(d)(1) (1969).
100. Id. § 212.11(d)(3).
101. Id. § 212.10(c).

The Federal Aid Highway Act was passed to accelerate construction of a National system of interstate highways to meet the needs of local and interstate highways and for the National and civil defense. The Federal aid systems are primary, secondary and interstate. The primary system is a system of connected main highways not exceeding 7 percent of total highway mileage of any state exclusive of mileage within National forests, Indian or other National reservations and within urban areas. Provision is made to increase the percentage figure by 1 percent increments when 90 percent of the road building has been finished. The secondary system of local roads may include farm to market roads, rural mail routes and the like. The interstate system, not to exceed 41,000 miles in total shall connect metropolitan centers and industrial centers, serve the National defense and and should connect at suitable border points with routes of Canada and Mexico. The initial determination of routes shall be made by individual state highway departments (interstate system to be designated by joint action of state highway departments) subject to the approval of the Secretary of Transportation. 23 U.S.C. § 103 (1964) as amended, (Supp. IV, 1969).

Apportionment of appropriated funds, see Authorization 23 U.S.C. § 102 (1964) among the various states will be determined by area, population, and total mileage of rural delivery and star routes of each state. (23 U.S.C. § 104)(1964), as amended, (Supp. IV, 1969). After apportionment, each state submits a program of Federal aid highway projects to the Secretary of Transportation for his approval. The Secretary is given discretion but is asked to give preference to interstate highways and projects recommended as important to the National defense by the Secretary of Defense (23 U.S.C. § 105)(1964), as amended, (Supp. IV, 1969). After approval of the plan, detailed plans, specifications and estimates must be submitted to the Secretary by the state highway departments (23 U.S.C. § 106)(1964), as amended, (Supp. IV, 1969). The secretary shall not approve the plan unless it meets the Government standards of safety, durability and economy of maintenance and conforms to the particular needs of the actual locality (23 U.S.C. § 109)(1964), as amended, (Supp. IV, 1969).

After the plans, specifications and estimates for a specific project has been approved, the Secretary of Transportation and state highway departments will enter into a project agreement which finalizes the commitment of state funds required for the states pro rata share of the cost of construction and maintenance.

The Federal Government shall provide not more than 50 percent of the cost of construction except that this amount can be increased if the particular state has more than 5 percent of its total area in nontaxable Indian land (tribal and individual) and public domain lands both reserved and unreserved exclusive of National forests, parks and monuments. (23 U.S.C. § 120(a) (Supp. IV, 1969)). The Federal Government's share could be as high as 60 percent on interstate system appropriations prior to June 29, 1956 (and even higher if the state has over 5 percent of Indian and public domain land). But the 60 percent maximum does not apply to project financed under section 2 of Federal Aid highway act of 1952. For advance acquisition of rights-of-way the Government is authorized to fund up to 90 percent of the costs, but provision for reimbursement by the state is required. 100 percent of the cost to eliminate railway-highway crossing hazards may be borne by the Government with the railroads reimbursing the United States for the benefit it received by reason of the hazard elimination (23 U.S.C. § 120(d), 130 (1964)).

The Secretary of Transportation is authorized to acquire lands or interests in lands (i.e., control of access from adjoining lands) required by the state for its Federal aid highway program if the state is unable to acquire the lands and agrees to pay at least 10 percent of the cost of acquisition (23 U.S.C. § 107(a) (1964)) and to convey the lands acquired, except the outside five feet of any such right-of-way in any state which does not provide control of access to the state (23 U.S.C. § 107(c)(1964)). The Secretary of Transportation may also aid the states in acquiring interests in land owned by the United States by making such arrangements with the agency having jurisdiction over such lands as may be necessary (23 U.S.C. § 107(d)(1964)).

103. Now the Secretary of Transportation. 49 U.S.C. § 1655 (Supp. IV, 1969).
104. Id.
105. 43 C.F.R. 2234.2-4(b)(1) (1969).

106. Rights-of-way are derived by the Bureau of Land Management to include an easement for the highway itself, scenic buffer zones along the highway, turn offs, and stock piling sizes and other administrative sizes for highway construction and maintenance purposes. Bureau of Land Management Manual § 2234.24A5 (Q) (Release 2-5, Oct. 5, 1964).
107. 43 C.F.R. § 2234.2-4(b)(1) (1969).
108. Id. § 2234.2-4(b)(2).
109. Id. § 2234.2-4(b)(3).
110. Id. § 2234.2-4(b)(4).
111. Id.; See Id. § 2234.1-3(c).
112. Id. § 2234.2-4(b)(4).
113. Bureau of Land Management Manual § 2234.24D1 (Release 2-5, Oct. 5, 1964).
114. 43 C.F.R. § 2234.2-4(b)(4) (1969).
115. Bureau of Land Management Manual § 2234.24F (Release 2-5, Oct. 5, 1964).
116. 43 C.F.R. § 2234.2-4(c) (1969).
117. Id. §§ 2234.1-1, 2234.1-6(c)(2).
118. 49 U.S.C. §§ 211-214 (1964).
119. Airport leasing is handled in the Department of the Interior by the Bureau of Land Management.
120. 49 U.S.C. § 211 (1964).
121. 5 Bureau of Land Management Manual § 3.2.13G (Release 141, Aug. 8, 1958).
122. Id. § 3.2.4A.
123. 43 C.F.R. § 2235.1-1(d)(1) (1969).

124. There is a small service charge of \$10.00 assessed if the applicant is not a municipality or a corporation which is a government instrumentality. Id. § 2235.1-1(d)(4); 5 Bureau of Land Management Manual § 3.2.6C (Release 141, Aug. 8, 1958).
125. 5 Bureau of Land Management Manual § 3.2.7 (Release 141, Aug. 8, 1958).
126. Id. § 3.2.8.
127. Id. § 3.2.13.
128. Id. § 3.2.5.
129. Id. § 3.2.10.
130. Id. § 3.2.11.
131. 49 U.S.C. § 212 (1964); 5 Bureau of Land Management Manual § 3.2.13F(1) (Release 141, Aug. 8, 1958).
132. 43 C.F.R. § 2335.1-1(i); 5 Bureau of Land Management Manual § 3.2.16 (Release 141, Aug. 8, 1958).
133. 5 Bureau of Land Management Manual § 3.2.15 (Release 141, Aug. 8, 1958).
134. Id. § 3.2.16.
135. 43 C.F.R. § 2235.1-1(h) (1969); Department of Interior Bureau of Land Management Form 4-455 (July 1958) (hereinafter cited as Form 4-455); 5 Bureau of Land Management Manual § 3.2.14 (Release 141, Aug. 8, 1958).
136. Form 4-455
137. 5 Bureau of Land Management Manual § 3.2.17 (Release 141, Aug. 8, 1958). No action ... by the Federal Aviation Administration. Id. § 3.2.18.
138. 49 U.S.C. § 212(e) (1964).
139. Id.

140. Form 4-455; 5 Bureau of Land Management Manual § 3.2.19 (Release 141, Aug. 8, 1958).
141. 43 C.F.R. § 2235.1-1(g) (1969); Form 4-455; 5 Bureau of Land Management Manual § 3.2.14 (Release 141, Aug. 8, 1958).
142. A "project" means the accomplishment of airport development with respect to a particular airport. 49 U.S.C. § 1101(a)(5) (1964). Airport development is defined as any work involved in constructing, improving, or repairing a public airport and any acquisition of land or any interest in land or of any easement through or other interest in air space, which is necessary to permit any such work or to remove, prevent or limit the establishment of airport hazards. Id. § 1101(a)(3).
143. 49 U.S.C. § 1115 (1964).
144. 14 C.F.R. § 153.3 (1969).
145. Id. § 153.9.
146. 43 C.F.R. § 2235.1-2(d)(2) (1969). Ordinarily where the lands involved are situated within a National park or monument or within an Indian reservation, the transfer will not be authorized.
147. 49 U.S.C. § 1115 (1964); 43 C.F.R. § 2235.1-2 (1969); James P. Kelly, A-25 775 (Apr. 11, 1950).
148. 5 Bureau of Land Management Manual § 2.45.5A (Release 101, May 22, 1957).
149. The Act itself provides that the department or agency head shall execute the conveyance with the approval of the President and the Attorney General. Exec. Order No. 10536, 3 C.F.R. 194 (1954-1958 Comp.), 49 U.S.C. § 1115 (1964), as amended, Exec. Order No. 11382, 3 C.F.R. 327 (1967 Comp.), 49 U.S.C. § 1115 (Supp. IV, 1969).
150. 49 U.S.C. § 1115 (1964); 43 C.F.R. § 2235.1-2 (1969).
151. 49 U.S.C. § 1115 (1964); 14 C.F.R. § 153.15 (1969). Although the statute specifically provides for an automatic reversion, the FAA will not consider the patentee's rights expired or extinguished until after it makes a formal determination. Afterwards, it assumed administrative responsibilities to preserve the air-commerce values of the lands. However, according to the Office of the Solicitor memo, March 26, 1969, the BLM considers the

above FAA finding is made without regard to land status and has neither effect nor impact upon the Government's title. This implies that the FAA determination is an interagency jurisdictional formality. The BLM letter continued in anticipation of a problem by warding against nonaction by BLM officers. It reminded them to be alert to immediate resumption of administrative jurisdiction over such land.

152. This ... expended. 49 U.S.C. § 1349 (1964).
153. 14 C.F.R. §§ 153.13(b), (d)-(e) (1969).
154. 43 C.F.R. §§ 2235.1-2(d), (f) (1969).
155. 50 U.S.C. App. § 1522(g) (1964).
156. 40 U.S.C. §§ 47 (et seq., (1964), as amended, (Supp. IV, 1969).
157. Property, the highest and best use of which is determined by the Administrator of the GSA to be industrial is not available for disposal under this authority. 50 U.S.C. App. § 1622(g)(1) (1964).
158. Id.
159. Id.
160. 23 U.S.C. § 402(a) (Supp. IV, 1969).
161. Id. § 202(a) (1964).
162. Id. §§ 202(b)-(c).
163. Id. § 202(b).
164. Id. § 202(c).
165. Id. § 204(a).
166. Id. § 205(a).
167. Id. § 209(a).
168. Id. § 206(a).
169. Id. § 207(a).
170. Id. § 214(a).

171. Id. § 204(a).
172. Id. § 204(b).
173. Id. § 204(c).
174. Id. § 205, as amended, (Supp. IV, 1969).
175. Id. § 209(b) (1964).
176. Id. § 206(b).
177. Id. § 207(b).
178. Id. § 207(c).
179. Id. § 214(c).
180. Id. § 204(d).
181. Id. § 204(e).
182. Id. § 209(b).
183. Id. § 204(f).
184. Id. § 205(d).
185. Id. § 209(d).
186. Id. § 214(b).
187. 16 U.S.C. § 8a (1964).

CHAPTER IX

MILITARY USES

The purpose of this chapter is to provide information on the military uses of the various components of the Department of Defense, including the Army, Air Force, and Navy, as well as the Department of Energy and the Department of Health and Human Services.

Of primary concern will be the use of the various components of the Department of Defense in the event of a military conflict. This chapter will provide information on the various components of the Department of Defense, including the Army, Air Force, and Navy, as well as the Department of Energy and the Department of Health and Human Services. It will also provide information on the various components of the Department of Defense, including the Army, Air Force, and Navy, as well as the Department of Energy and the Department of Health and Human Services.

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This section will discuss the use of Government-owned and administered lands for military purposes. The discussion will center on use by the various departments of the Department of Defense, specifically, the Army, Air Force, and Navy, as well as the Atomic Energy Commission and the National Guard.

Of prime concern will be the methods for the acquisition of Government-owned land by the various departments for their military use. Title to the land is, in all cases, in the Government as such; what is acquired by the military department or other Federal agency is thus only control of the property. Although title is never conveyed to any Government department, it will simplify this discussion to a peak as if what is being acquired or transferred in any case is the land, rather than just some form of control of the land.^{1/} The interests acquired by the military department range from the full fee simple, to lesser interests such as leases, easements, or permits. The discussion of acquisition will deal with the methods for reassignment of land within the Department of Defense, and with transfer of land from one Federal agency to another when the controlling agency finds the land excess to its needs.

In addition to considering means of acquisition of land, this section will also consider questions of retention of control over land. This involves procedures within any given department for determining when property under its control is excess to its needs or when any property, though not excess, is not currently needed for present uses, and therefore may be suitably used on a temporary basis by others. Since this is a study of military uses of public land, procedures for transfer or reassignment will be relevant only insofar as they bear on the subsequent availability of the land in question for other military uses. Finally, it should be stressed that the land under discussion here is all land that is currently owned by the Government. If a military department seeks real property not owned by the United States, "express authorization by law" is required.^{2/}

I. STATUTES OF GENERAL APPLICABILITY

The Federal Property and Administrative Services Act of 1949 delineates the system whereby the Federal Government utilizes and disposes of its

real and personal property. 3/ The Act defines as "excess," real property that which is not currently needed to fulfill the responsibilities of the controlling agency. 4/ The standard of need is reasonable expectation of foreseeable use. 40 U.S.C. § 483(a) (1964) provides that the Administrator of GSA shall provide the policies and methods for the transfer of excess property among Federal agencies. Thus, § 483(a) provides a clear authorization for the acquisition of real property for Federal military purposes.

Once an agency has determined that certain property is not required for its present or reasonably foreseeable needs, it is required to report such property as excess to the GSA, which ordinarily handles the disposal itself. 5/ Agencies are required to survey continuously the real property under their control so that prompt reports may be made to the GSA of excess property. 6/ Where land that has been withdrawn from the public domain is involved, the department that seeks to declare such land excess must notify the Department of the Interior as well as GSA. 7/ If the Bureau of Land Management determines that the land is suitable for return to the public domain, the Department of the Interior may formally accept it. 8/

The Secretary of Defense is authorized to dispose of any excess real property under his control, whose fair market value is less than \$1,000, upon his determination that such property is not required by other Federal agencies. 9/ The Secretary is authorized to redelegate this authority within his department 10/ and has done so. 11/ However, the Secretary of a military department or his designee may not transfer real property to another Federal agency or to another military department or to a state, or make a report of excess property, where the value of such property is over \$50,000 until the expiration of thirty days after notification to the American Services Committee of the Senate and the House of Representatives. 12/

Each agency is required to ascertain its own need for additional property and to report such need to the GSA, so that when reports of excess property are made to GSA it can screen such requests with awareness of the agency needs to be met. 13/ Upon receipt of a report of excess property, GSA notifies all those agencies that may reasonably be expected to have a need for it. 14/

Upon the determination of the GSA that a transfer is in the best interests of the Government, it may be made. 15/ Provisions for reimbursement are set out at 41 C.F.R. § 101-47.203-7(f) (1969).

The GSA has delegated to the Army Chief of Engineers the authority to act as agent under the general provisions of the Federal Property and Administrative Services Act. Pursuant to Department of the Army, Chief of Engineers Reg. No. 405-1-900(4) § 4 (Nov. 26, 1965), the Chief of Engineers acts as agent in the disposition of land for the Departments of the Army, the Air Force and the Atomic Energy Commission.

Each department has its own procedures for recommending that property under its control be placed in excess status. For example, the procedure for securing an excess status for Army real property begins with the submission by the installation commander, in triplicate, through channels, to the Deputy Chief of Staff for Logistics his statement that an installation or portion thereof is not needed for the requirements of the using service.16/ A copy of the recommendation will be sent to the Division or District Engineer for advance disposal planning and screening.17/ If an industrial installation is involved, the Deputy Chief of Staff for Logistics will make his report to the Secretary of the Army who will direct the disposal.18/ Upon receipt of the excess recommendation the Deputy Chief of Staff for Logistics determines whether the process of disposal should proceed, and if such determination to proceed is made, the recommendation is sent to the Chief of Engineers for screening.19/ The process of reporting and checking for types of recommendations that require clearance by different officers within the particular department and the defense department generally is outlined in its different variations in AR No. 405-90 § 4a(2), "Procedure for effecting change in status to excess."

A military department may acquire land that has been declared excess by any Federal agency. The Chief of Engineers acts as agent for the Army and Air Force in their acquisition of all land.20/ The Navy relies on its own personnel in this area, as in the decision to place property in excess status.

However, it is the policy of the military that land that is excess to the needs of any one department will first be made available to other military departments before being made available generally to other Federal agencies.21/ This policy is reflected in the priorities set by the various military departments for the acquisition of land. Real estate that is excess to the Department of the Army will be offered first to other military departments prior to any other disposition.22/ Conversely, it is Army policy that when its land need cannot be filled by inter-agency "shuffling" transfer from the Navy or Air Force of lands excess to their requirements is top priority.23/ Similarly, the Air Force will offer real property excess to its immediate needs first to the other military departments,24/ and seeks as top priority the acquisition of

lands declared excess by the other military departments.^{25/} The Navy NAVFAC Real Estate manual gives priority to the needs of the military departments when screening excess property.^{26/}

This policy is also reflected in the procedures followed by the Chief of Engineers as agent for the disposal, transfer and reassignment of Army and Air Force lands. He will receive and evaluate Army requirements for excess lands in order to facilitate reassignments within the military departments.^{27/} Procedures for screening Department of Defense property with an eye to defense needs, "Screening, Reassignment and Interchange of Real Property Within the Department of Defense."

40 U. S. C. § 483(a) (1964), discussed above, deals with the transfer of excess property among Federal agencies, and thus constitutes one means for the acquisition and disposal of land for military purposes. 40 U.S.C. § 483(c) (1964) constitutes another method. That section provides that each executive agency shall, as far as practicable, reassign property among activities within the agency, when such property is no longer required for the particular purposes for which it was appropriated. Department of Defense Directive 4165.6 (Sept. 15, 1955) redelegates to the Secretaries of the military departments and their designees, authority to administer real estates actions under this legislation. Although this section speaks of reassignment in the special context of land no longer required for the particular purpose for which it was appropriated as different from transfer among agencies of excess property, the implementing military regulations fail to make this distinction. Instead, they treat transfer and reassignment essentially the same. However, it should be noted that § 483(c) (1964), unlike § 483(a) may constitute the special Congressional authorization necessary to transfer property purchased under specific Congressional Act for public purposes from one "department" to another.^{28/} Depending on the definition of "department," either § 483(c) (1964) or 10 U.S.C. § 2571a (1964), discussed infra, may constitute that special Congressional authorization.

The Federal Property and Administrative Services Act also provides for the disposal of surplus Federal property, that is, property that has been declared excess by the controlling agency, and that GSA then determines is not suitable for further Federal use.^{29/} The Act provides that such property shall first be made available to certain eligible public agencies for public use before being made available to the general public. Such surplus property may be put to military-related use. Specifically, it is provided that surplus property under the control of the Department of Defense should first be evaluated by the Secretary to determine whether such property is usable and necessary for educational activities

of particular interest to the military, naval, Air Force or Coast Guard preparatory schools. If so usable, the Secretary is directed to allocate the land for transfer by the Administrator of GSA to the appropriate state agency for distribution. 30/

§ 484(j)(4) provides for a determination to be made by the Federal Civil Defense Administrator whether any surplus property is usable and necessary in any state for civil defense purposes, including research purposes. Before transfer can be made, the Federal Civil Defense Administrator must receive certification from the state agency that the property is in fact usable and needed for civil defense purposes, and must himself determine that the state agency conforms to the minimum standards of operation prescribed by the Federal Civil Defense Administrator for the disposal of surplus property. 31/

Upon the satisfaction of the terms of this section, the Federal Civil Defense Administrator shall allocate the property for transfer by the GSA to the indicated state agency for distribution to civil defense organizations of the state or of subdivisions or instrumentalities thereof.

§ 484(k)(2) (1964) gives to the Administrator of General Services thirty days to disapprove of certain disposal action taken by various agency heads under their statutory authorization. As long as the Administrator does not disapprove, the Secretary of Defense, with respect to property transferred pursuant to the Surplus Property Act of 1944 to states, political subdivisions, and tax supported instrumentalities, for use in the training and maintenance of civilian components of the armed forces, and the Federal Civil Defense Administrator, with respect to surplus property transferred pursuant to 40 U. S. C. § 484(j)(4) (1964), are authorized to determine and enforce terms and conditions in transfer instruments, to reform, correct or amend such instruments where necessary, and to grant release from any of the terms of the instrument or of any rights reserved by the United States where appropriate.

II. SPECIFIC STATUTES

This section will deal with those statutes that specifically authorize interests in land for military use, apart from the Federal Property and Administrative Services Act discussed above.

A. Acquisition of Property by the Secretary of a Military Department

One statute generally authorizing such acquisition is 10 U. S. C. § 2663 (1964), which provides that the Secretary may institute condemnation proceedings to acquire any interest in land, including temporary use, needed for:

- (1) fortifications, coast defenses or military training camps;
- (2) sites for the production and manufacture of explosives; and
- (3) the operation of power plants in connection with the manufacture of explosives. 32/

The statute also provides for the immediate use of land when war is imminent, upon the filing of a petition for condemnation. 33 / In both cases, the Secretary may purchase the land in question for a price he considers reasonable. 34/ Finally, the Secretary may acquire by way of gift, any interest in land, including temporary use, for any of the purposes named above. 35/

10 U. S. C. § 2672 (1964) provides that the Secretary of a military department may acquire any interest in land that he or his designee determines is needed in the interest of National defense and does not cost more than \$25,000. If the land is acquired as part of a project, this section applies only if the parcels involved are not contiguous or, if contiguous, if the entire project costs no more than \$25,000. This code section was amended in 1962 by Congress. Before that, the cost ceiling was set at \$5,000 and, perhaps more importantly, the Secretary or his designee had to determine that the land was "urgently" needed in the National defense. Now it is enough if the land is simply needed. The use of the language "any interest" suggests that the full range of property interests may be acquired pursuant to this section. The Air Force has interpreted the authority granted as including acquisition by gift, purchase, exchange of Government-owned land, or otherwise. 36/

B. Transfer from One Armed Service to Another

10 U. S. C. § 2571 (1964) provides that if either Secretary requests it, and the other approves, real estate (as well as other supplied) may be transferred from one armed force to another, without compensation.

The legislative history indicates that this Act was introduced in 1955 in order to make available to the Air Force the same opportunities for interchange of property that had been made available to the Army, Navy, and Coast Guard in 1919. 37/ In 1949 the Federal Property and Administrative Services Act had been passed, and the legislative history of § 2571 states that the Act will in no way affect authority to transfer property under 40 U. S. C. §§ 483(a) or (c) (1964), but will simply put the Air Force on a par with the other armed forces under the Act of 1919. 38/

Nothing in any of the research materials has indicated when the armed forces proceed under the authority of 10 U. S. C. § 483 (1964). Certainly this is a question that it would be well to know more about.

C. The Granting of Leases, Easements, Licenses or Permits by a Military Department

Strictly speaking, this subject is not directly tied to the question of military use of public land. However, there are two respects in which it is relevant to the subject at hand. First, some leases, easements or licenses do have a military related use as their goal. Second, and perhaps more important, the granting of such temporary or partial interest in or rights to use lands under its control, makes it possible for a military department to retain control of lands not presently in use, without rendering those lands a loss to the Government.

1. Leases

10 U. S. C. § 2667 (1964) authorizes the Secretary of any military department to lease out land under his control that is not currently needed for public use but is not excess property within the meaning of 40 U. S. C. § 472(E) (1964) when he considers it advantageous to the United States, upon such terms as he considers will promote the National defense or be in the public interest. If the annual rental exceeds \$50,000, thirty days notice must be given to the Congressional Armed Services Committees, pursuant to 10 U. S. C. § 2662(a)(3) (1964). The Act further provides that the lease shall ordinarily not be for more than five years. Ordinarily the lease must be revocable at any time by the Secretary, and in all cases must be revocable during a National emergency declared by the President. The money that is paid for the lease is taken into the Treasury as miscellaneous receipts.

The various departments have provided for the implementation of this statute. 39/

In all cases authority to carry out the leasing has been delegated by the Secretary. In the Army and the Air Force it has been delegated to the Chief of Engineers. 40/ In the Navy it has been delegated to the Chief of the Bureau of Yards and Docks. 41/ Where the rental exceeds \$25,000 a year, special procedures for upper level approval within the department are specified. 42/ Where the rental is more than \$50,000 provision is made for notification to the Congress, pursuant to 10 U.S.C. § 2662(a)(3) (1964). 43/

Consideration for the rental of Government property is ordinarily required to be paid in money only. 44/ However, 10 U.S.C. § 2667(b)(5) makes an exception to this rule, and states that maintenance, protection or restoration of the leased property may constitute part or all of the consideration. The departments have generally taken the position that the lease must yield the fair market value in rental, 45/ or at least adequate consideration. 46/ On the other hand, the Air Force provides that in the case of leases for certain purposes, including leases to states for civil defense purposes, the maintenance or protection of the property may serve as all or part of the consideration. 47/ And the Navy provides that a lease may only be entered into when a substantial benefit will accrue to the Government, such as reduced maintenance costs or improved property management, as well as cash rental. 48/

2. Easements

10 U.S.C. § 2668 (1964) authorizes the Secretary of a military department to grant easements, or rights-of-way, over land under his control, upon a finding that it will not be against the public interest. Unlike the language authorizing leases, there is no requirement for an affirmative finding that the easement is advantageous to the United States. The statute lists approved purposes for easements, such as roads and canals, but concludes that the Secretary may authorize an easement for "any other purpose that he deems advisable." 10 U.S.C. § 2669 (1964) provides for the granting of easements for gas, water and sewer pipelines. 49/ Conceivable defense uses under this statute exist. However, its primary thrust is land use by the states and their subdivisions and agencies for nonmilitary purposes, and therefore is more appropriately dealt with elsewhere.

3. Licenses

Unlike leases and easements, a license is not an interest in land, but is simply a right to come on the land for some purpose, and is necessarily revocable at the will of the licensor. There is no general statutory authorization for the granting of licenses by the Secretaries. However, each department has found such authorization inherent in its administrative power. 50/ Each service also requires that the license be of direct benefit to it. 51/

With respect to military uses, the Army specifically refers to ROTC use of Army Reserve Centers, 52/ licenses to the states for the use of the National Guard, 53/ and part time use by recruiting services of the Selective Service System. 54/ The Air Force notes specially that licenses may be given to the National Guard and to the Civil Air Patrol. 55/ One apparent oddity in this area is the fact that the Atomic Energy Commission's control over the exploration for and mining of fissionable material has led to the right of the Atomic Energy Commission to grant such licenses on all United States lands, including military lands. 56/

4. Permits

The term permit, in this context, means the grant by one Federal agency to another to use its land on a temporary basis, regardless of whether the right granted is in the nature of a lease or a license. Military departments, like other Federal agencies, may grant permits, 57/ and do. For example, the Army has authorized Army commanders to enter into agreements with Navy and Air Force commands for use of Army Reserve facilities. 58/

D. The Acquisition of Interests Less Than the Fee by Military Departments or for Military Purposes

1. Leases

The military departments, like other Federal agencies may acquire less than a full fee interest, if that is in the best interests of the Government. Thus, for example, 10 U.S.C. § 2662(a)(2) (1964) provides that the Secretary of any military department must notify the Armed Services Committees of the Senate and the House of Representatives before entering into any lease of property on behalf of the United States, if the estimated rental is over \$50,000. However, it appears that the military departments are hesitant about acquiring a lease rather than the full fee.

The policy of the Air Force is that the acquisition of an interest less than the full fee will be considered in the best interest of the Government when the estimated period of required use is so limited that fee acquisition could not be justified for economic reasons. 59/ Moreover, the Air Force is clearly concerned about the placing of permanent construction on property in which the Government has less than a fee interest or a perpetual easement. Among the conditions under which such construction will be allowed are a firm right of renewal for at least fifty years where the land is required for air bases, or renewal for 25 years where the land is required for installations such as radar bomb scoring sites. 60/

2. Permits

The Army's general document on the acquisition of land does not specifically discuss leases of non-Government owned land, but rather discusses the policies governing short term use of Government land by permit, policies that clearly parallel the Air Force policies on leases. It states that such an interest in land will be taken only if the military use can be fulfilled on a short term basis, or if the real property is not an integral part of a permanent Army installation or construction site, or if transfer cannot be obtained from the controlling Government agency. 61/ Similarly, it is the policy of the Air Force that where land is under the control of another Federal agency, construction or modification of facilities will not be done without an attempt to obtain a permit for the full period of the requirement, or at least for a five year permit with an option to renew for five years. 62/

At this point, it might be pointed out that although the military regulations distinguish leases, as temporary use of non-Government land, from permits, temporary use of Government land under the control of another department or agency, this linguistic distinction is not supported by the language of 10 U. S. C. § 2662(a)(3) (1964). That section requires notice to Congress by the Secretary of a military department, of leases of land from the United States, where the annual rental exceeds \$50,000. This study adheres to the practice of the military in distinguishing between leases and permits on the basis of whether the land is owned by the Government or by others. 63/

One fairly common use of land belonging to the Department of Agriculture by the Departments of the Air Force, Army, and Navy, is for maneuver and training purposes. 64/ The Forest Service Manual provides for "joint policy" agreements between the Department of Agriculture and the specific military department.

The Forest Service Manual §§ 1533.11, 1533.22, 1533.31 (Amend. No. 123, Nov. 1964) provide for "joint policy" agreements between the Department of the Agriculture and the Departments of the Air Force, Army, and Navy respectively. The policy statements acknowledge the need for varied terrain for maneuver and training purposes, and state that immediate availability is often of prime importance; that full recognition of defense efforts is made and efforts exerted to speed compliance with requests for the use of such lands will be made only when essential; that due to the innate danger to the area, other lands possibly available will be thoroughly investigated with an eye to securing other areas; and that the regional foresters and the Chief of Engineers will be the negotiating parties respectively. 65/

In addition to these policy agreements, the more common memoranda of understanding are a frequently used device for establishing rights and interest in real property for military use. 66/

Permits may also be obtained from the Bureau of Land Management by the military departments for limited use of public domain lands. Prior approval of the Assistant Secretary of Defense is required where the total area exceeds 500 acres and the period of use exceeds one year, or the value of the land exceeds \$50,000. 67/ The Division or District Engineer may approve all other permits for the use of public domain land. 68/

3. Leases and Permits for Military Purposes Other than by Military Departments

Part 5 of the Atomic Energy Commission Manual App. ch. 5301 (Apr. 18, 1968) deals, among other things, with temporary use of land by the Atomic Energy Commission. Procedures for acquiring leased space are set out in B of that part. With respect to permits for the use of Government land, § A notes that a temporary use permit for public domain land differs from a reservation or withdrawal of such land principally in that the permit would not preclude others from coming onto the land for mining purposes.

The Federal Civil Defense Administrator is authorized to lease land for certain purposes, such as the conduct of a training program and the acquisition of necessary defense facilities. 69/ 50 U. S. C. App. § 2285 (1964) sets out the same requirements for notice to the Congressional Armed Services committees, as is provided in 10 U. S. C. § 2662 (1964). 50 U. S. C. App. § 2285(a)(3) (1964) requires reporting of leases of land owned by the United States when the estimated rental

exceeds \$50,000. It would thus appear that rentals of United States property were contemplated for civil defense purposes, although it might be more appropriate in some contexts to refer to these as permits than as leases, since a Government agency is involved.

E. Withdrawals, Reservations and Restrictions of Public Domain

Withdrawals, reservations and restrictions from the public domain are a traditional method of land acquisition for military use. 70/ The President may withdraw and reserve from the jurisdiction of the Bureau of Land Management, Department of the Interior, lands and appropriate them to special uses of other departments. 71/ That general reservation authority was delegated to the Secretary of the Interior under Executive Order No. 10355. 72/ The "Withdrawal and Reservation" study discusses in detail the issues and development of the Pickett Act and the Executive Order No. 10355. The power to withdraw public domain lands specifically for defense purposes is subject to 43 U.S.C. § 156 (1964) requiring Congressional action if such withdrawal involves over 5,000 acres. Generally, the heads of Federal agencies or their designees may apply for a withdrawal or reservation of lands owned or controlled by the United States. 73/ As concerns the Department of Defense, when § 156 applies, the Secretary is required to submit to Congress a report on the bill introduced to effect the proposed withdrawal. 74/ If such recommendation is accepted and the bill passes, notification to the Bureau of Land Management will be made by notice in the Federal Register. Similarly, should the bill fail, the Bureau will be notified. 75/

Department of Defense Directive 4165.12 § IV A (1) (Feb. 6, 1967) requires that withdrawals of land in excess of 500 acres for more than one year must have prior approval of the Assistant Secretary of Defense (Installation and Logistics). Except in time of war, where a proposed withdrawal is less than 5,000 acres, the "normal channels" are followed: requests for withdrawal of public domain lands are made to the appropriate State or Regional Supervisor of the Bureau of Land Management by the District Engineer and a copy of that request will be forwarded to the Chief of Engineers with "a request for assistance in obtaining issuance of the public land order in time to meet construction or military deadline". 76/ Internal procedures for the requesting of public domain land are to be found in Army Reg. No. 405-10 § 11(b) (); Air Force Reg. No. 87-1 § 15 (1966) and Atomic Energy Real Estate Management Manual App. § 5301 Part 5 A (1968).

Lands withdrawn from the public domain may not be disposed of under the normal excess property procedures unless the Secretary of the Interior determines, with the concurrence of the Administrator of General Services, that they are not suitable for return to public domain. 77/ However, the President is authorized to transfer land withdrawn from the public domain for public purposes from one executive agency to another where public interest requires. 78/

The President may order unappropriated public lands to be reserved for an air base or a field for tests and experiments for the Army or Air Force, and such land, and other United States property may be used for either purpose. 79/ However, where more than 5,000 acres are involved, Congressional action is needed. 80/

Withdrawals can be created by specific act of Congress. These public laws usually do not specify the nature of the military use but merely identify the department or project with which they are associated. 81/

F. Miscellaneous Provisions for the Acquisition and Use of Land by Military Departments

1. Procurement of Options Prior to Authorization to Acquire Real Estate

10 U.S.C. § 2677 (1964) allows the Secretary of any military department to take an option on real estate which is "suitable and likely to be required" in connection with a military public works project, prior to express authorization by law for the acquisition of that real estate.

2. Facilities for Reserve Components

10 U.S.C. §§ 2231-2238 (1964) authorizes the Secretary of Defense to acquire by purchase, lease, transfer, construction, expansion, rehabilitation or conversion the facilities necessary for the training and maintenance of the reserve components of the armed forces. "Facility" is expressly defined to include an interest in land. 82/ The Secretary of Defense may delegate any of this authority to officers or departments of the Department of Defense. 83/ Where the cost of the facility exceeds \$50,000, thirty day notice must be given to the Senate and House of Representatives, except in the case of leases, which are exempted from this requirement. 84/ The facilities covered by 10 U.S.C. §§ 2231-2238 (1964) include facilities used by the National Guard.

3. Exchanges Between the Secretary of Defense and Secretary of Agriculture

These two Secretaries are authorized, pursuant to 16 U.S.C. § 505a (1964) to arrange for the exchange of land subject to the Federal Property and Administrative Services Act, where military land is within or adjacent to the exterior boundaries of a National park, in order to facilitate maximum land use. A 45 day notice to Congress is required.

4. Military Parks

16 U.S.C. §§ 411-412 (1964) declares military parks to be "National fields for military maneuvers for the regular Army of the United States and the National Guard or militia of the States." They are open at the discretion of the Secretary of the Army and pursuant to his regulations.

5. Acceptance of Gifts

Donations of land for a particular defense purpose may be taken by the Secretary, through the GSA. 85/ Special statutory authorization also provides for the acquisition of land by donation for permanent mobilization, training and supply stations, and for the purposes of an aviation field. 86/ Finally, under 10 U.S.C. § 2601, (1964), the Secretary concerned may accept and administer gifts, bequests, or devises of real property made on condition that it be used in connection with a school, hospital, library, etc., under the jurisdiction of that department.

6. General Purpose Space

Under 40 U.S.C. § 490 (1964), as amended, (Supp. IV, 1969) the Administrator of GSA has the responsibility for the acquisition by lease of general purpose space, the assignment and reassignment of such space among Federal agencies, and the maintenance of such space. Thus, the general purpose space sought by the military departments is in most cases obtained in this fashion. 87/ However, in some cases, the military department will assume the primary responsibility for the acquisition of general purpose space, as, for example, where the general purpose space is incidental to special purpose space, or where it exceeds 2,500 acres and is outside certain selected areas. 88/

7. The Atomic Energy Commission

42 U.S.C. § 2011 (1964) stresses the defense functions of atomic energy and thereby suggests that land acquired by the Commission is essentially land acquired for a military use. The President is directed to transfer to the Commission all interest owned by the United States or any Governmental agency in all fissionable material. 89/ This would seem to imply significant use of Governmental land by agents of the Commission. Further, the President may issue leases and permits in National parks and wildlife refuges by Executive Order, in the interest of National defense and security, for exploration of such lands, in connection with Commission efforts. 90/

Footnotes

1. Dep't of the Army Pamphlet No. 27-164 ¶ 13.4 n. 23 (Oct. 1965)
2. 10 U.S.C. § 2676 (1964).
3. 40 U.S.C. §§ 571-484 (1964).
4. Id. § 472(e).
5. Id. § 483(b); 41 C.F.R. § 101-47.203-2 (1969).
6. 40 U.S.C. § 472(d); 41 C.F.R. § 101-47.201.2 (1969).
7. 40 U.S.C. § 472(d); 41 C.F.R. § 101-47.202.6 (1969).
8. 43 C.F.R. § 2312.1-2(a) (1969).
9. 41 C.F.R. § 101-47.601 (1969).
10. Id. § 101-47.601(d).
11. See, e.g., Secretary of the Air Force Order No. 703-11 (Aug. 5, 1966) (hereinafter cited as AF Order).
12. 10 U.S.C. § 2662 (1964).
13. 40 U.S.C. § 483(b); 41 C.F.R. § 101-47.201.2, 203-3 (1969).
14. 41 C.F.R. § 101-47.203-5 (1969).
15. Id. §§ 203.5, 203.7.
16. Army Regulations No. 405-90 ¶ 4 A(1) (Change 2, Aug. 1962) (hereinafter cited as AR).
17. Id.
18. Dep't of the Army Pamphlet No. 27-164 ¶ 13.7 (Oct. 1965).
19. AR No. 405-90 ¶ 4a (2) (Change 2, Aug. 1962); Air Force Regulation No. 87-1 ¶ 8 (Oct. 11, 1966) (hereinafter cited as AFR).

20. 10 U.S.C. § 3038 (1964).
21. Dep't of Defense Instruction No. 4165.12 ¶ IV C (Feb. 6, 1967) (hereinafter cited as DOD Instruction).
22. AR No. 405-90 ¶ 3b (1959).
23. Id. No. 405-10 ¶ 5b(2) (May 28, 1962).
24. AFR 87-3 ¶ 2b(1) (Sept. 28, 1960).
25. Id. No. 87-1 ¶ 2a(2) (Oct. 11, 1966).
26. Dep't of the Navy NAVFAC Real Estate Manual ¶ 19.7.1 (Change 3, Dec. 1963) (hereinafter cited as NAVFAC R. E. Manual)
27. 10 U.S.C. § 3038 (1964); AR No. 405-90 ¶ 5E (Change 2, Aug. 1962).
28. 33 Op. Att'y Gen. 288 (1922).
29. 40 U.S.C. §§ 472(g), 484 (1964).
30. Id. § 484(j)(2).
31. The actions of the Federal Civil Defense Administrator under this section are also governed by 50 U.S.C. App. §§ 2253(c), (e), 2257, 2281(b) (1964).
32. 10 U.S.C. § 2663(a) (1964).
33. Id. § 2663(b).
34. Id. § 2663(c).
35. Id. § 2663(d).
36. AF Order 703.11 ¶ 1b (Aug. 5, 1966).
37. Coast Guard Act 14 U.S.C. § 640 (1964).
38. S. Rep. No. 409, 84th Cong., 1st Sess. (1955), United States Administrative News 2044 (1955).

39. Dep't of the Navy, SECNAV Instruction 11011.18B (June 30, 1964) (hereinafter cited as SECNAV Instruction); NAVFAC R. E. Manual ch. 19 (Change 3, Dec. 1963); AFR No. 87-3 (Sept. 28, 1960); AF Order No. 703.5 (May 3, 1962); AR No. 405-80; Atomic Energy Commission Manual App. ch. 5301 pt. 6 ¶ B (April 16, 1968) (testing by the Atomic Energy Commission).
40. Dep't of the Army, Chief of Engineers Reg. No. 405-1-900 ¶ 4 (Nov. 24, 1965); AR Order No. 703.5 ¶ 2 (May 3, 1962).
41. SECNAV Instruction 11011.18B ¶ 5 (June 30, 1964).
42. AFR No. 87-3 ¶ 4b (Sept. 28, 1960); NAVFAC R. E. Manual ¶ 19.6.1 (Change 3, Dec. 1963).
43. SECNAV No. 11011.18B ¶ 8a (June 30, 1964); AFR No. 87-3 ¶ 4b (Sept. 28, 1960).
44. 40 U.S.C. § 303(b) (1964).
45. AFR No. 87-3 ¶ 2 (Sept. 28, 1960).
46. Dep't of the Army, JAGR 1960/1640 (1960) (hereinafter cited as JAGR).
47. AF Order No. 703.5 ¶ 7A (May 3, 1962).
48. See SECNAV Instruction 11011.18B ¶ 4d (June 30, 1964).
49. For implementing provisions of ¶ 2668, 2669, see AR No. 405-80 ¶ 24 (), NAVFAC R. E. Manual ¶ 23.3.3 (Change 3, Dec. 1963); AFR No. 87-3 ¶ 8b (Sept. 28, 1960).
50. JAGR 1958/2673 (1958); AR No. 405-80 ¶¶ 31-32 (); NAVFAC R. E. Manual ¶ 20.4 (Change 3, Dec. 1963).
51. NAVFAC R. E. Manual ¶¶ 20.2.3, 20.8, (Changes 3, Dec. 1963); AFR No. 87-3 ¶ 8c(1) (Sept. 28, 1960).
52. AR No. 405-80 ¶ 33 ().
53. Id. ¶ 38.
54. Id. ¶ 43.
55. AFR No. 87-3 ¶¶ 8c(2), d-e (Sept. 28, 1960).

56. AR No. 405-80 § 65; 42 U.S.C. § 2097 (1964).
57. Bureau of the Budget Circular No. A-2(6) (rev.) (Apr. 5, 1967).
58. AR No. 405-80 § 44.
59. AFR 87-1 § 2b(2) (Oct. 11, 1966).
60. Id. 2f (Oct. 11, 1966), as changed, (Change 1, June 22, 1967).
61. AR No. 405-10 §§ 9b, 10c (May 28, 1962).
62. AFR No. 87-1 § 20 (Oct. 11, 1966).
63. The DOD agencies and the Atomic Energy Commission use over 150,000 acres controlled by other agencies.
64. AR No. 4-5-10 § 10b (May 28, 1969) (Permits to use land for maneuver purposes); Id. §§ 5g(2)(b) 3-4.
65. Forest Service Manual §§ 1533.11A 1-2, B1-2, D1, 4 (Amend. No. 123, Nov. 1964).
66. See Forest Service Handbook § 2747.1 to 2 (Sept. 1958) Air Force Academy for training purposes, with United States Air Force for radar station sites).
67. AR No. 405-10 §§ 11b(1)(2) (Change 11, July 27, 1967); AFR No. 87-1 § 6a (7) (Oct. 11, 1966).
68. AR 405-11 § 11d (Change 11, July 27, 1967).
69. 50 U.S.C. App. § 2281(e), (h) (Supp. IV, 1969).
70. The DOD agencies and the Atomic Energy Commission control 16, 331, 836 acres of public domain. Bureau of Land Management, Dep't of the Interior, Public Land Statistics, (1967).
71. 7 Op. Att'y Gen. 571 (1855).
72. United States Public Land Law Review Commission. See Study of Withdrawals and Reservations of Public Domain Lands, 305-340 for a detailed discussion of the issues and development of the Pickett Act and Exec. Order 10355.

73. 43 C. F. R. § 2331.0-6 (1969).
74. Id. § 2331.1(a).
75. Id. §§ 2331.1(b), (c).
76. AR No. 405-1-620 § 21b (Feb. 23, 1966).
77. 40 U. S. C. § 472 (1964).
78. 37 Op. Att'y Gen. 417, 431 (1931).
79. 10 U. S. C. §§ 4772, 9772 (1964).
80. 43 U. S. C. § 156 (1964).
81. E. g. Act of Sept. 26, 1961 P. L. 87-320, 75 Stat. 682; Act of Sept. 26, 1961 P. L. 87-326, 75 Stat. 686; Act of Aug. 24, 1962 P. L. 87-597, 76 Stat. 399.
82. 10 U. S. C. § 2234(2)(a) (1964).
83. Id. § 2233(c).
84. Id. § 2233(a).
85. 50 U. S. C. §§ 1151, 1152 (1964).
86. 10 U. S. C. § 4771 (1964).
87. AR No. 405-10 §§ 3-4 (May 28, 1962) set out the procedures whereby such space is acquired by the Army for its use.
88. Id. § 20a(2).
89. 42 U. S. C. § 2015 (1964).
90. Id. § 2097.

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